IN THE SENATE OF THE UNITED STATES.

March 23, 1860.—Ordered to be printed.

Mr. Toombs made the following

REPORT.

[To accompany bill S. 307.]

The select committee to whom was referred the memorial of residents and owners of lands in the parishes of Ascension and Iberville, Louisiana, praying the repeal of the "Act to provide for the location of certain confirmed private land claims in the State of Missouri, and for other purposes;" to whom, also, were referred the protest of the owners of the Houmas grant, have had the same under consideration, and report:

That it appears that on the 5th of October, 1774, one Maurice Conway and Alexander Latil purchased of the Bayou Golau and Houmas Indians a tract of land measuring upwards of half a league in front, on the river Mississippi, about seventy-five miles above the city of New Orleans.

This purchase, it appears, was approved by Unzaga, the governor of Louisiana, to that extent, and *with the common depth of forty arpents.*

The front is bounded on the river, at a common depth of forty arpents in the rear, and the side lines were described by the adjoining tracts.

Afterwards, on the 9th of September, 1776, Maurice Conway petitioned Governor Unzaga for an additional grant in the rear. Omitting the formal parts, that petition sets forth as follows:

"That your petitioner, intending to go and establish himself in the upper part of the country, on the land which he has purchased jointly with Alexander Latil, and, with your permission, from the Houmas Indians, which land is extremely deficient of fences, and is cleared out upwards of a league in depth, so that the cypress swamp being at a distance of about one league and a half from the river, your petitioner has no right thereto, in consequence of your not having granted to him but the common depth of forty arpents, which is so short that he cannot reach the cypress trees necessary for making fences, and other work absolutely necessary on a plantation. Therefore, your petitioner prays you will grant him all the depth which may be vacant immediately after the said depth of forty arpents."

The said Conway further avers that he was the sole proprietor, having purchased the moiety which belonged to Latil, and prays that Unzaga " will direct Louis Andry to put your petitioner in possession

of the said front and depth, setting the boundaries and giving to your petitioner a certificate of the whole for his information and security."

In pursuance of this petition, Unzaga, on the 27th September, 1776, made his order that "Captain Louis Andry shall go on the land mentioned in the foregoing petition, and shall put the petitioner in the possession of the land which may there be vacant on the back of the forty arpents of depth which he possesses, and running in the same directions, provided the same be vacant and do not injure the neighbors, to the effect of which *he shall set and mark the boundaries, and shall extend after this decree a* PROCES VERBAL *of his operations*, which, signed by him and the said neighbors, shall be forwarded to me, that I may cause the complete title to issue."

It further appears that, on the 9th day of October, 1776, Captain Andry made the survey, and certified that he went on the land alluded to, accompanied by Conway and the commandant of the district, Louis Judice, and after having called on the Indian chief to designate the boundaries of his sale, his *procés verbal* then proceeds as follows: "And immediately after I have measured the space between those boundaries, drawing to that effect in the woods the lines necessary to ascertain its extent, [which lines are marked on the plan, a sketch of my operations which I have delivered to said petitioner,] and found that it contains ninety-six arpents in front on the river, growing wider one hundred and twenty degrees in depth, on account of its being situated on the bend of the river, the upper line common with Francis Duhan, running north fifty degrees to the west, and the lower one common with Michel Chiasson, running north seventy degrees to the east.

"The measurement of said front being thus made, I proceeded to put the petitioner in the possession of the depth granted to him by the foregoing decree, to the effect of which I went back to the upper line common with Francis Duhan, in whose presence I found out the boundaries set by me on the 22d of December, 1773, and which still exist in the same situation, distance, and direction, both of mulberry wood—the first * * * at the distance of thirty-seven toises, and two feet from the actual bank of the river, and the second * * * at one arpent or thirty toises more in the back. Afterwards I continued in the same line, and in the aforesaid direction, of north fifty degrees west to the depth of forty arpents, opening to that effect a small road through the woods, at which place I caused to be driven two feet and a half in the earth a boundary of cypress wood * * * at the further distance of two arpents—that is, at forty-two arpents from the river—another boundary similar in all its circumstances to the one just spoken of. This line being thus drawn, I went to the lower one common with Michel Chiasson, whom I also called, and after measuring the seven arpents which, by the decree of the 27th of September last, the governor aforesaid granted to him, I caused two boundaries of mulberry wood to be driven in the said line, the first * * at the distance of twenty toises more in the depth. After that I continued the said line through the wood in the same direction of north seventy degrees east to the depth of forty arpents, at which point I caused to be driven two and a half feet in the earth a boundary of cypress, * * * and at

the further distance of two other arpents—that is, at the distance of forty-two arpents—from the river, I caused another boundary of the same size, and similar in all its circumstances to the foregoing, to be driven into the earth in order that the direction may not deviate.

And in order that all the above may appear, I give the present certificate, which I have signed, with the said petition of Maurice Conway, and the said commandant and interpreter of this transaction, Louis Judice, the said Indian chief named Calabe, and the two adjoining neighbors, Francis Duhan and Michel Chiasson, having declared not to know how to sign. All which I do attest at the aforesaid coast or district the day and year above written."

The procés verbal is accordingly signed by Andry, Conway, and Judice.

On the 21st June, 1777, Galvez, the then governor of Louisiana, made the grant, which is in the following terms:

"Bernardo de Galvez, colonel of the battalion of infantry of Louisiana, governor, intendant, and inspector general thereof, having seen the foregoing proceedings of the second adjutant of this place, the Captain Lewis Andry, concerning the possession which he has given to Maurice Conway by virtue of the foregoing decree, issued by my predecessor, of all the vacant land, behind or in the rear of the forty first arpents, which he possesses, by ninety-six arpents in front, on the river, running in the same direction as these; and whereas the same is conformable to the rules made touching surveying of land and adjoining neighbors, so that no injury is done to said neighbors, who, so far from having made any opposition, have consented to said operations, of which I do hereby approve, and, using the faculty that the king has given me, I grant, in his royal name, to the said Maurice Conway the said land behind or in the rear of the forty arpents which are contained in his plantation, situated in the district of La Fouche, by ninety-six in the front in the river, following the same direction as those, in order that, as his own property, he may dispose or enjoy the same conformably to the said operations, and complying with the conditions prescribed in the ordinances made on the subject of lands."

It does not appear that any of these original papers referred to are in existence, or were ever recorded, but assuming them to be genuine, they constitute the whole of the title of the claimant under the Houmas grant under the Spanish grant.

It does not appear that the fact of the grant has ever been contested by this government. The whole question has been as to its extent.

The first account we have of this claim under this government was an application made by the claimant, about the year 1804, to Governor Claiborne, of Louisiana, to have the same surveyed, and in pursuance of an order from him, one Bartholomew Lafon was appointed to survey the same.

Lafon's survey ran out the northwest line to Bayou Manchac, and the northeastern line to Lake Maurepas, including all the lands included in these boundaries out to the Mauchac and Amite rivers, which was there the boundary on the east of the possessions of the Spanish crown.

This survey, with the perfect Spanish grant, upon which it was reputed

to be founded, was laid before the board of commissioners, organized under the act of the 2d March, 1805, for the purpose of ascertaining and adjusting the titles and claims to lands within the Territory of Orleans and the district of Louisiana. It had then been parceled into three distinct tracts, one held by Donaldson and Scott, and the another by Daniel Clarke, and the third by William Conway, all claiming title by purchase or succession from Maurice Conway.

The two commissioners who composed the board at the time the claims and the evidence to support them were presented, decided that "the claimants had fully established their right, that their title was a genuine and complete Spanish grant, and that it included all the land claimed by them and included in Lafon's survey. These decisions appear under the numbers 125, 127, and 133, in the transcript of their decisions laid before Congress, by the Secretary of the Treasury, on the 8th day of January, 1812. Thomas B. Robertson, who became a member of the board subsequently to its action on these claims, entered a formal dissent from these decisions. According to the laws establishing this commission, these decisions of the commissioners were to be reported to Congress for its final action and decision thereon.

That the claimants under the Houmas grant were entitled to ninety-six arpents front on the Mississippi river, and the *common* depth of forty arpents rear, seems to have been conceded by all of the agents and officers of the government, and that they were entitled to a back concession to *some* extent, seems also to have been generally admitted. The whole controversy rests upon the extent of the back concession. No officer or agent of the government, except two of the commissioners, appointed under the act of 1805, ever acknowledged the grant to the extent claimed. We may except also Judge Bibb, who, when Secretary of the Treasury, held, that under the act of 1814, Congress had confirmed it to the whole extent claimed. This decision of Governor Bibb was subsequently reversed by the circuit court of the United States, and from which decision the claimants under the Houmas grant have not appealed.

With these exceptions, the whole action of the government, from the day of the treaty of 1803 up to the act of the 2d June, 1858, now under consideration, has been against the claim to the extent urged by the persons claiming under this grant.

The grant of the 21st June, 1777, from Governor Galvez to Maurice Conway, contains the whole claim to the premises in dispute. It never was petitioned for, surveyed, or granted, otherwise than hereinbefore stated. It was a complete grant to all it conveyed, and the sole question in controversy, admitting the grant to be genuine, is, how much it embraced. To that extent, the government of the United States is bound, both by the law of nations, and the treaty of 1803, by which we acquired the title of France to Louisiana. It required no further acknowledgment, no act of Congress, no confirmation of commissioners to the perfection of the right of those who claimed under it. The government of the United States covenanted, so far as concerns this controversy, to do nothing except to preserve the rights of property of those persons who owned property in Louisiana. The government of

the United States performed all of its treaty stipulations with France with fidelity and honor. It not only respected perfect rights of property, but, with a wise liberality, it undertook to carry out with reference to the people of the ceded province, all of the undertakings, perfect or imperfect, of both the governments of France and Spain, the former proprietors of Louisiana.

The act of 1805 *required* all persons claiming under incomplete titles, and *permitted* all persons having *complete* titles, to present them within a limited time to commissioners appointed under that act, whose duty it was to examine them, and report their decisions thereon to Congress. Their decisions were not final; they were subject to the determination of Congress thereon.

The act of 1806 still further aided honest claimants under the French and Spanish governments.

The act of 1807 vested in the commissioners the power finally to determine upon all cases which involved no more than the quantity of land contained in one league square; and the act of 1814 authorized the issuance of patents to all persons coming within the act of 1807.

The claimants under the Houmas grant come within none of these acts of Congress. It has been before remarked that they sought to bring themselves under this act of 1814. This pretension, after having been allowed by Governor Bibb, was condemned by the circuit court of the United States. Efforts were made at different times to get a recognition of this grant to the extent claimed by its owners, both from Congress and the different departments of the government, from 1805 to 1858; but all these efforts failed. A very full and accurate history of these efforts, and of this claim generally, is to be found in an opinion of Mr. Justice Clifford, now of the Supreme Court, then Attorney General of the United States, given to the President, in pursuance of a resolution of Congress passed the 26th of June, 1846, to which your committee beg leave to refer the Senate, in order to avoid its repetition here.

The difficulty, as before observed, in this grant is this: the back line of the survey never was closed. The surveyor ran but two arpents back of the first forty arpents "to keep the course." How far the two lines from the river were to run was not specified. The petitioner wanted a timber privilege for less than 4,000 acres of land; represented that he had no timber for fences, and other necessary plantation purposes; said that the cypress was one and a half leagues back of the river, and it seems asked a concession of *all the back lands* to get timber for his farm.

Under the term, "all the back lands," the Houmas claimants, *after* the treaty of cession, and *never* before, claimed and surveyed above 180,000 acres of land for a timber privilege for less than 4,000 acres. This timber was scattered over more than 300 square miles, in a country not naturally well adapted to easy transportation.

This pretension was very naturally considered exhorbitant and unreasonable, and nothing but the clearest words of grant, unrestrained by the facts and circumstances of the case, could be deemed sufficient to maintain it. Therefore the officers of the government and Congress uniformly, with the exception before stated, refused to recognize it.

The claimants under the Houmas grant have been in possession of the river front from 1777 to this time, and the extent of this possession to the rear does not appear to the committee ; but, in 1776, the King of Spain imported from the Canary Islands a company of poor immigrants, and settled them on the Iberville and Amite rivers, twenty or thirty miles from the river Mississippi, granted them lands, and established the town of Galveston, all within the limits of said grant as now claimed.

Some grants upon the Mississippi river were made before this, and with which this Houmas grant conflicts, and others were made after this grant, within the limits as now claimed, without objection or complaint from these grantees, as far as your committee have been able to ascertain.

Other persons, squatters, without legal rights, have also, from time to time, settled on these back lands, relying upon the uniform policy of the government to grant them preëmption, if the land should prove to belong to the government and not to the claimants. All these settlers in the aggregate, according to the memorial before your committee, amount to about five hundred families. Some of these occupants have located on their premises in pursuance of Spanish or French grants older than the Houmas grant, others under grants younger than that grant, and others still relying solely upon the goodness of the title of this government ; and it is a strong fact in this case that, from 1803 to this hour, as far as your committee have been able to learn, no effort has been made to eject any of these persons by the Houmas grantees.

We have already shown that the title of the grantees was perfect to every extent that they had title at all—just as perfect without as with congressional action, *if it were a good title*—yet they seem never to have ventured to assert it in the courts, even against a squatter.

Your committee do not deem it necessary to give any opinion as to the validity of the Houmas grant, or its extent, further than to say, that it is not, in their judgment, such a title as Congress ought to affirm, to the prejudice of the other parties at interest, without a judicial affirmance of it.

The act of the 2d June, 1859, gives a great and unjust advantage to the claimants, for which your committee see no sound reason, either in justice or sound policy. It gives the Houmas grantees paramount title to the lands in dispute, and requires all adverse claimants to make good their titles by suits at law ; and if they fail, for any reason whatever, to show a perfect title in themselves, their lands all fall to the Houmas grantees. This is manifestly unjust to such adverse claimants, and may inflict the most cruel wrongs upon them. But this bill is also unjust to the public. If the Houmas grantees have no good title to this vast body of lands, it is against sound principle and sound policy to give it to them. By the third section of said act, if any of these grantees within the lines of the Houmas grant should be able to maintain their titles, this section allows the Houmas grantees to float on the public lands for such deficiency. Therefore, if any portion of their grant shall be defeated, even by a better and superior title, though it may be derived from Spain or France, this act makes up the

loss to the claimants under the Houmas grant from the public domain. This legislation, also, we think unsound and untenable. Your committee therefore recommend that the second section of the act of 2d June, 1858, and also so much of the third section as refers to the second, be repealed, and that the title of the claimants under the Houmas grant be judicially settled; and for which purposes they herewith report a bill.

APPENDIX.

MARCH 26, 1860.—*Ordered*, That the opinion of the Attorney General, dated December 31, 1847, made in compliance with "A joint resolution in relation to the issuing of grants of certain lands in Louisiana," approved June 26, 1846, and the statement of Louis Janin, counsel for certain claimants under the Houmas land grant, be printed as an appendix to the report (No. 150) of the Select Committee.

REPORT OF THE ATTORNEY GENERAL.

ATTORNEY GENERAL'S OFFICE,
December 31, 1847.

SIR: In compliance with the joint resolution of Congress, approved 26th June, 1846, entitled "A resolution in relation to the issuing of grants of certain lands in Louisiana," I have examined the questions submitted to me in the case to which it refers, and have now the honor to report the result of that examination, and my opinion thereon, for your consideration.

The purpose which Congress had in view in instituting this examination, is very fully and explicitly disclosed in the resolution. It provides "that the Attorney General of the United States be, and he is hereby, directed to examine the evidences of title in the case of a certain Spanish land claim in the State of Louisiana, lying on the Mississippi, above New Orleans, commonly known as the Houmas claim, and to report his opinion thereon to the President of the United States; and, if in the opinion of the Attorney General any patent or patents issued, or which may be issued under such claim, shall have been, or shall be issued, contrary to law, that the President of the United States be, and he is hereby, requested to cause proceedings to be instituted in behalf of the United States, and to have the validity of such patent or patents judicially determined."

Two points of inquiry are obviously presented in the resolution, neither of which can be satisfactorily answered without an accurate knowledge of the facts. The *first* clause relates to the title of the claimants to the land referred to in the resolution, and requires an opinion as to the evidences in support of it; which presents a distinct issue involving the validity of the whole claim. The *second* refers to the patents which have been issued on the claim; and, by necessary implication, to the circumstances under which those evidences of title are executed, and clearly puts in issue the authority assumed in granting them.

The evidences of title to be examined are not specified, nor is there any designation of the source from which they should be derived, other than what may be inferred from the description of the claim to which they relate.

Under these circumstances, and with a view to obtain all the documents relating to the claim, I addressed a communication to the Commissioner of the General Land Office on the 20th of December, 1846, calling his attention to the resolution, and requesting him to furnish me with any information in his office upon the subject, and received with his reply what I suppose to be a full compliance with my request. In the meanwhile, other official engagements had intervened, admitting of no delay, and rendering it impracticable to complete the examination, at that time, in a manner which its importance seemed to demand, and it was accordingly postponed. Having since resumed the subject, and examined all the papers relating to the title in my possession, and fully considered the several arguments filed in the case, I will proceed to state the result of my investigations, and the conclusions which I have formed upon the respective inquiries embraced in the resolution.

It was my first object, after resuming the subject, to ascertain the origin of the title. There can be no doubt, I think, that a part of the tract of land in dispute was once possessed, and perhaps owned, by the Bayou Goula and Houmas Indians, who derived their right to the same under the authorities of the province of Louisiana, while it was subject to the dominion of France. The precise character of their interest, or the extent and boundaries of their possessions, do not very satisfactorily appear. The first title paper produced in support of the present claim appears to have been executed during the period of the Spanish rule over the province, about twenty-nine years before its formal surrender and delivery by France to the United States. It purports to be a copy of a conveyance from the chief of those two tribes to one Maurice Conway and Alexander Latil, and bears date at New Orleans, the 5th October, 1774, wherein the said chief, in consideration of the sum of one hundred and fifty dollars paid to him in goods, cedes to them "a tract of land measuring upwards of half a league, at the distance of twenty-two leagues from this city, on this side of the river, joining on the upper side lands belonging to John the blacksmith; and on the lower side, the place where are erected the huts in which the said two nations of Indians now live; but when the said huts will be taken away, to be transported on the other side of the river, the true boundary on the lower side will be the lands belonging to an old Acadian, named Peter; so by the measurement which the said purchasers will make of the said tract of land according to the said boundaries, its exact contents will be ascertained." This purchase, it appears, was approved by Unzaga, the then governor of Louisiana, by his order or decree, bearing even date with the conveyance, in which he also granted the lands to the purchasers, and directed them to apply to him in order that, in virtue of the sale and approbation, he might cause a complete title to be issued to them.

There is no evidence that a formal application in writing was ever made for a complete title, except what may be inferred from the recitals

of the grant, which appears to have been regularly executed by Unzaga, on the 1st of November, 1774, and is as follows: "In consequence of the above certified copy and approbation of the sale that the chief named Calazare made, both in his name and in that of the Bayou Goula and Houmas Indian nations under his command, to Maurice Conway and Alexander Latil, of this city, of a tract of land which was granted to them by the ancient French governor, measuring upwards of half a league in front, on the river Mississippi, on the coast of Cabahanoce, in the district of Mr. Judice, joining on the upper side the plantation belonging to the blacksmith, and on the lower side that of an old Acadian, named Peter, and there being no opposition made on part of these two neighbors, and no injury being made to their respective boundary lines, using of the faculty that the king has given me, I grant, in his royal name, to the said Maurice Conway and Alexander Latil, the above-mentioned tract of land, which measures upwards of half a league in front on the aforesaid coast, with the common depth of forty arpents, joining on the upper side the plantation belonging to John the blacksmith, and on the lower side that of the old Acadian, named Peter, that, as their own property, they may dispose of or enjoy the same, conformably to the said sale and conditions imposed by the regulations concerning lands."

The extracts above given have not been compared with the original papers, there being none such in my possession in relation to this part of the case. Finding them, however, in translations furnished by the claimants, which were published by the order of the Senate, and perceiving no reason to question their accuracy, I have adopted them in tracing this branch of the title. They will be found in *Senate document No.* 144, *second session Twenty-fifth Congress*, appended to the memorial of the heirs of Wade Hampton, which was presented to Congress in 1837.

Whatever practical difficulties might have arisen at that time in an attempt to ascertain the side lines above-mentioned, growing out of the uncertainty that probably existed in regard to the precise boundaries of the adjoining locations, it must be admitted, I think, that the land is too explicitly described on the face of the grant to be matter of controversy. The front is bounded on the river; it has a common depth of forty arpents, which could readily be ascertained by a survey, and the side lines are described by the adjoining tracts; the practical uncertainty in regard to which, it may be presumed, constituted one of the causes which led to the petition of Conway to Unzaga, hereinafter mentioned.

Pursuing the inquiry in the order of events, we come now to the grant, which is the principal subject of dispute. On this point we have, in the first place, what purports to be the original title paper, in the form and language in which it was first executed by the Spanish authorities in Louisiana. It having been furnished by the Land Office, and appearing to be genuine, I know of no reason to question its authenticity, and therefore assume that the claimants are entitled to the full benefits of its provisions, so far as their rights under it are defined and can be ascertained.

It contains the original petition of Conway addressed to Unzaga,

and his order of survey thereon; the *procés verbal* by Captain Louis Andry of the survey made by him under the order; and the grant made by Galvez, the successor of Unzaga.

By a reference to the translation of these documents, furnished by the claimants, it will appear that the petition was made to Unzaga by Maurice Conway, and bears date the 9th September, 1776. Omitting the formal part, it sets forth as follows: "That your petitioner intending to go and establish himself in the upper part of the country, on the land which he has purchased jointly with Alexander Latil, and, with your permission, from the Houmas Indians, which land is entirely deficient of fences, and is cleared out upwards of a league in the depth, so that the cypress swamp being at the distance of about one league and a half from the river, your petitioner has no right thereto in consequence of your not having granted to him but the common depth of forty arpents, which is so short that he cannot reach the cypress trees necessary for making fences, and other work absolutely indispensible on a plantation, therefore your petitioner prays you will grant him all the depth which may be vacant immediately after the said depth of forty arpents." The petitioner further states that he is the sole proprietor, having purchased the moiety which belonged to Latil, and prays that Unzaga "will direct Louis Andry to come and put your petitioner in possession of the said front and depth, setting the boundaries, and giving to your petitioner a certificate of the whole for his information and surety."

Upon this petition the governor, on the 27th September, 1776, made his order or decree, in which he directs that "Captain Louis Andry shall go on the land mentioned in the foregoing petition, and shall put the petitioner in possession of the land which may there be vacant on the back of the forty arpents of depth which he possesses, and running in the same directions; provided the same be vacant and do not injure the neighbors, to the effect of which he shall set and mark the boundaries, and shall extend after this decree a *procés verbal* of his operations, which, signed by him and the said neighbors, shall be forwarded to me, that I may cause the complete title to issue."

On the 9th October, 1776, Captain Andry made the survey, and certified that he went on the land alluded to, accompanied by Conway and the commandant of the district, Louis Judice, who, understanding the language of the Indians, he requested to call their chief, that he he might show the upper and lower boundaries; that the said Judice having complied with the request, the said chief came, and answered by means of the said interpreter and commandant: "that the said land sold by him extended and was previously occupied by the said Indians from the lower boundary of Francis Duhan, on the upper side, to the boundary of Michel Chiasson, on the lower one; which names do not now agree with those mentioned in the instrument of sale in consequence of said lands having passed into the hands of several owners since the said period." The *procés verbal* then proceeds as follows: "And, immediately after, I have measured the space between those boundaries, drawing to that effect in the woods the lines necessary to ascertain its extent, (which lines are marked on the plan or sketch of my operations, which I have delivered to the said petitioner,) and found

that it contains ninety-six arpents in front on the river, growing wider one hundred and twenty degrees in the depth, on account of its being situated on the bend of the river, the upper line, common with Francis Duhan, running north fifty degrees to the west, and the lower one, common with Michel Chiasson, running north seventy degrees to the east. The measurement of the said front being thus made, I proceeded to put the petitioner in the possession of the depth granted to him by the foregoing decree: to the effect of which I went back to the upper line, common with Francis Duhan, in whose presence I found out the boundaries set by me on the 22d December, 1773, and which still exist in the same situation, distance, and direction, both of mulberry wood —the first *** at the distance of thirty-seven toises or fathoms and two feet from the actual bank of the river, and the second *** at one arpent or thirty toises more in the back; afterwards, I *continued* in the same line and in the aforesaid direction of north fifty degrees west, to the depth of forty arpents, opening to that effect a small road through the woods, at which place I caused to be driven two feet and a half into the earth a boundary of cypress wood ***; and at the further distance of two arpents, that is, at forty-two arpents from the river, I set another boundary, similar in all its circumstances to the one just spoken of. This line being thus drawn, I went to the lower one, common with Michael Chiassson, whom I also called, and, after measuring the seven arpents which, by decree of the 27th September last, the governor aforesaid granted to him, I caused two boundaries of mulberry wood to be driven in the said line, the first * * at the distance of twenty toises from the actual bank of the river, and the second * * at the distance of twenty toises more in the depth; after that I *continued* the said line through the wood, in the same direction of north seventy degrees east, to the depth of forty arpents, at which point I caused to be driven two and a half feet into the earth a boundary of cypress wood ***; and at the further distance of two other arpents, that is, at the distance of forty-two arpents from the river, I caused another boundary, of the same size and similar in all its circumstances to the foregoing, to be driven into the earth, in order that the direction may not deviate. And, in order that all the above may appear, I give the present certificate, which I have signed, with the said petitioner, Maurice Conway, and the said commandant and interpreter in this transaction, Louis Judice, the said Indian chief, named Calabe, and the two adjoining neighbors, Francis Duhan and Michel Chiasson, having declared not to know how to sign: all which I do attest, at the aforesaid coast or district, the day and year above written." The *procés verbal* is accordingly signed by Andry, Conway, and Judice.

It is much to be regretted that the figurative plan or sketch referred to by Andry, and which he delivered to Conway, had not been preserved, or, if still in existence, that it had not been produced as a part of the evidence in the case. In the absence of that paper, it will become necessary to examine the *procés verbal*, or official certificate of survey, with more care; it being the only mode of ascertaining the lines actually run on the occasion, and the monuments set in the field in pursuance of the decree of Unzaga, and the essential foundation of all the initiatory proceedings upon which the grant is based. Of necessity

there must be some guide to ascertain the boundaries of the tract, or the whole proceeding would be void for uncertainty. There is not, at present, in the case any other evidence than this certificate, upon which we can rely for this information.

On the 21st June, 1777, Galvez, the then governor of Louisiana, made the grant, which is in the following terms:

"Bernardo de Galvez, colonel of the battalion of infantry of Louisiana, governor, intendent, and inspector general *pro tempore* thereof, having seen the foregoing proceedings of the second adjutant of this place, the Captain Louis Andry, concerning the possession which he has given to Maurice Conway, by virtue of the foregoing decree, issued by my predecessor, of all the vacant land behind or in the rear of the forty first arpents which he possesses, by ninety-six arpents in front of the river, running in the same direction as these; and whereas, the same is conformable to the rules made touching surveying of lands and adjoining neighbors, so that no injury is done to said neighbors, who, far from having made any opposition, have consented to the said operations, of which I do hereby approve; and using the faculty that the king has given me, I grant, in his royal name, to the said Maurice Conway, the said land behind or in the rear of the forty arpents which are contained in his plantation, situated in the district of Lafourche, by ninety-six in front on the river, following the same direction as those, in order that, as his own property, he may dispose or enjoy the same conformably to the said operations, and complying with the conditions prescribed in the ordinances made on the subject of lands."

Another translation of the petition, order of survey, *procés verbal* of the survey, and the grant, is to be found in Clarke's Land Laws, page 954, substantially the same as that furnished by the claimants.

The survey upon which the grant was made bears date the 9th October, 1776; and, in tracing this title, I have omitted any reference to a small tract of six by forty arpents, situate on the upper side of the Houmas claim, which Conway purchased of Landry on the 18th of October, 1776. The purchase having been made nine days after the survey of Andry, and of course subsequent to all the initiatory proceedings upon which the grant to Conway was made, it can in no way affect any conclusion that may be formed upon the terms of this grant; nor does it appear to be embraced in the range of this investigation.

Having thus shown the origin of this claim, it is only necessary here to remark that, under the grant, the claimants insist they are entitled to a tract of country on the left bank of the Mississippi river, with a front of a league and one seventh, and with a depth extending to the rivers Amite and Iberville, and Lake Maurepas, the side lines diverging from the front north fifty degrees west, on the upper side, and north seventy degrees east, on the lower side, to the rear boundary aforesaid, and including by estimate more than one hundred and eighty thousand acres.—(See plat annexed, marked A.)

The United States acquired the territory, at that time known as the province of Louisiana, by the treaty concluded at Paris the 30th April, 1803, and it was formally delivered to the United States on the 20th December, of the same year. By that treaty it was stipulated that the inhabitants should be incorporated into the Union, and admitted as

soon as possible to the rights of citizenship, and that "in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Subsequent to the treaty, and in anticipation of the delivery of the territory, Congress passed the act of the 31st October, 1803, entitled "An act to enable the President of the United States to take possession of the territories ceded by France to the United States," by the treaty aforesaid, "and for the temporary government thereof." (2 Statutes at Large, 245.)

The *second* section provides "that, until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and *shall be exercised in such manner as the President of the United States shall direct*, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion." William C. C. Claiborne, of Mississippi, was duly appointed governor of Louisiana on the same day the act passed.

Shortly after the surrender of the province, and the appointment of Mr. Claiborne as governor, William Donaldson, in behalf of himself, William Marrener, and Patrick Conway, describing themselves as owners of a tract of land called the Houmas, presented their petition to Governor Claiborne, stating the grant of the tract to Maurice Conway, and that, "being desirous of ascertaining the outlines and boundaries of the said land, with such precision as to avoid any interference with the proprietors of the neighboring grants, and thereby prevent expensive disputes, humbly prays that your excellency will be pleased to permit the said William Marrener, or such other person as may be appointed for that purpose, to survey the said tract of land, and mark the boundaries thereof; and at the same time the directions may be given to the proprietors of the adjoining patents to show their boundaries to the said surveyor, that he may avoid any interference therewith, and to the commandant of the district to protect him from all illegal disturbances in the prosecution of said work."

Upon this petition Governor Claiborne made the subjoined order: "The proprietors of land adjoining the tract within mentioned are requested to show their respective boundaries, and the commandant of the district, if necessary, will extend to the surveyor his protection."

The petition and order are without dates, in the form in which I find them, in *Senate document No.* 45, *second session, Twenty-eighth Congress, p.* 20. This is the first account we have of the claim under this government.

It was subsequently laid before the commissioners appointed under the act of 3d March, 1805, when it was claimed in three several parcels —the upper tract by William Donaldson and John W. Scott, the middle by Daniel Clarke, and the lower by William Conway.

In order to present a full view of this case, it now becomes necessary to examine certain surveys and ancient conveyances which were laid before the commissioners, and have since been relied on as supporting the views of the claimants in regard to the extent of the grant.

1st. *The Donaldson and Scott tract.*—On the 28th December, 1804, a certain Bartholomew Lafon, alleging himself to be a surveyor commissioned by Governor Claiborne, certified a plat and certificate of survey of this tract, conformably, as he says, to a survey made by William Marrener on the 27th June, 4th August, and 3d December, 1804, and to measurements executed by himself on the Iberville, which he describes in the plat as the northern boundary, carrying back the depth to that river, making the length of the upper line four hundred and sixty arpents and fifteen toises, and the lower line three hundred and eighty arpents. The copy of this certificate will be found in the proceedings before said board, as printed in *Senate Doc. No.* 45, *p.* 17. *See also plat B, hereunto annexed.*

The first title papers laid before the commissioners in reference to this tract consist of certain proceedings relating to a judicial sale in the matter of the estate of Colonel Gilbert Anthony St. Maxent, of which a certified copy in Spanish is among the papers, and a printed translation is annexed to the aforesaid memorial of the heirs of Wade Hampton, p. 24. There is recited in the proceedings what purports to be a clause of the will of St. Maxent, which is given in the following words: "I declare for the effects which may be proper to have among my property, a plantation in the place called Houmas, at about eighteen leagues from this city, which I purchased for the price of six thousand dollars from Maurice Conway, about seven years ago, by act passed in one of the notaries' offices of this city aforesaid, measuring eighteen arpents in front, by upwards of four leagues in depth." The conveyance referred to by Maurice Conway to St. Maxent is not given.

The extract from the will of St. Maxent is followed by an authenticated copy of the petition of Peter de Marigny, with the order thereon, which, according to the certificate, appears in folio 276 of the proceedings. It is not shown to whom the petition was addressed; but it sets forth that no more than fifteen hundred dollars had been bid for the plantation, and that he thinks it will be proper to suspend the adjudication thereof until the month of November then next. It further states that, by the clause of the will of St. Maxent before quoted, the said plantation measured eighteen arpents front, by upwards of four leagues in depth; that it had been appraised at the sum of four thousand five hundred dollars; whereas the sum which had been bid for it was but the half of the two thirds at which it was appraised; and that perhaps the inhabitants, "being ignorant of the depth belonging to the said plantation, have not made the biddings according to the value which that depth must give it." He therefore prays that an order issue to Cantrelle, the commandant of the post, containing this representation and the decree thereon, and directing him to have the plantation cried for sale until August next; to send circulars to the neighboring posts to receive the biddings of the bidders respectively; and, informing every one of the depth, to cause the same to be adjudged in whole or in parts; which biddings, in the month of August, he should forward to the proper tribunal, that the adjudication might be made conformably thereto, on the terms of credit to be granted, and on the securities to be required from the purchasers. The decree thereon was: "Let it be done as prayed for."

On folio 378, which, let it be observed, is subsequent to the foregoing petition, there is the following entry: "And, as for the lands of the Houmas, let the order prayed for be issued, inserting therein the contents of the foregoing writing; and let appraisers be appointed who, after they have accepted of their appointment, and promised under oath to discharge well and faithfully the duties incumbent on them, shall proceed to appraise said lands, which shall be sold for cash in case more than two thirds of their appraisement value shall be bid for them, and the proceeds of the sale shall be forwarded by the first secure opportunity.

"JOHN VENTURA MORALES,
"LICENTIATE MANUEL SERRANO."

Morales was intendant of the royal revenue, and this decree seems to have been addressed to Evan Jones, the then commandant of the parish of Lafourche.

On the 1st of August, 1798, Jones received the order on his way to the city of New Orleans, and, in a communication to the intendant, states that there are two persons in the city sufficiently acquainted with the quality and circumstances of the land; therefore, the intendant could order, if he thought proper, that they appraise the same.—(See Hampton's memorial, p. 25.)

On the 3d of August, 1798, in consequence of the above, the intendant directed the lands to be appraised by Simon Ducorneau and Alexo Lesassier. The said Ducorneau and Lesassier accordingly appraised the land before a notary, describing it at about twenty-four leagues from the city, and "that, considering that the said lands measure about twenty-nine arpents in front by upwards of four leagues in depth, they do appraise the same, after consultation and agreement between them, at the sum of twenty-four hundred dollars, the said land being now uninhabited, without any buildings or improvements whatsoever thereon; which price they appraise it at, as the one which they consider it is worth, and no more."

Thereupon, the following decree was made: "The present notary shall call on the printer, and showing him the foregoing appraisement, he will cause him to publish in his Gazette a notice informing the public that the sale of said lands shall take place on the 13th instant, at four o'clock in the afternoon, at this intendant's house.

"MORALES."

The notary accordingly caused the following notice to be published in the Gazette of the 9th August, 1798:

"For sale: A land, of twenty-nine arpents in front by about four leagues in depth, situated at twenty-four leagues from New Orleans," &c.

On folio 382, under date of the 6th of August, 1798, there appears the following decree: "Whereas the foregoing decree is to be executed only in case Evan Jones, commandant of Lafourche, should not have been able to sell said lands, let an order, directed to him, issue, containing the appraisement and this decree, directing him to proceed to the said sale, for cash, provided the price bidden for it be upwards of

the two thirds of the appraised value, there being no higher bidder, to pay the sum due for the making of the levee, causing the receipt thereof to be annexed to the proceedings, which, together with the balance of the proceeds of said sale, shall be forwarded to this tribunal, and to give due notice before the thirteenth instant, conformably to what has been already decreed on this subject.

"JOHN VENTURA MORALES,
"LICENTIATE SERRANO."

It appears, however, that Commandant Jones had sold the land on the 12th of August, 1798; and it is worthy of special notice that, in his final act of sale, or title paper to the purchaser, to complete his action, and the one upon which all the rights acquired by the purchaser depend, he describes the land sold by him "as measuring twenty-nine arpents in front *by the depth which could be found.*"—(Sen. Doc. No. 45, p. 17. See, also, translation annexed to Hampton's memorial, p. 26.)

Louis Faure having bid $1,650, more than two thirds of the appraised value, and no person outbidding him, the said commandant adjudged the said lands to Faure and his heirs forever, and signed the act of sale.

The next title paper produced before the board of commissioners is a conveyance by Faure to John W. Scott, dated 2d June, 1803. (See Spanish copy, Senate Doc. No. 45, p. 18.) This describes the land as "a front of twenty-nine arpents upon all the depth which can be found."

An agreement, under date 3d November, 1803, between John W. Scott and William Donaldson, was also produced, as per Spanish copy, p. 19, which describes the land with "a front of twenty-nine arpents, with all the depth which can be found."

2d. *The Daniel Clarke tract.*—The said Lafon, on the 25th September, 1805, alleging himself to be a surveyor commissioned by Governor Claiborne as aforesaid, certified a plat and certificate of survey of this tract, conformably, as he says, to a survey made by Marrener, and to measurements which he, Lafon, had executed in November, 1804, upon the river Amite and environs of Galveston, which plat was composed of two parcels of land, one acquired from Marrener and the other from William Conway, in which he represents the river Amite and Iberville as the northern boundary of the tract, giving the length of the lower side line as three hundred and fifty arpents, and giving the upper as three hundred and eighty arpents.—(See copy of certificate among the proceedings of the commissioners, Senate Doc. No. 45, p. 13. See also plat C, hereunto annexed.)

Several conveyances were also laid before the board respecting this portion of the claim, which it becomes important to examine, so far as relates to the language employed in describing the depth of the grant.

1. Conveyance bearing date 14th December, 1785, from the proprietor, Maurice Conway, to Patrick Conway, of "ten arpents of front, with the depth which comprehends the title of the said lands."—(Senate Doc. No. 45, p. 14.)

2. Conveyance, dated 17th March, 1802, from Patrick Conway to

William Marrener, of "ten arpents of front, and the depth corresponding to the title granted by this government to Maurice Conway."—(Senate Doc. No. 45, p. 14.)

3. Conveyance, dated 8th January, 1805, from William Marrener to Daniel Clarke, as "ten arpents front, with the depth according to the title of concession conferred by the late government to the late Maurice Conway."—(Senate Doc. No. 45, p. 15.)

4. Conveyance, dated 11th June, 1805, William Conway to Daniel Clarke, of a portion of the land which he describes as "having ten arpents of face upon the river, bounded above by the lands of the buyer and below by those of the seller, and extends in depth to the river Amite, sold according to the general title which is in the vender, from having acquired it from Maurice Conway, by act of the 27th October, 1786.—(See Senate Doc. No. 45, p. 13.)

It will hereafter appear that the conveyance, above referred to, from Maurice Conway to William Conway, was produced before the board in the proceedings in relation to the third tract, and that it does not claim to the Amite.

3d. *The William Conway tract.*—In this case, as in the two former, a plat and certificate of survey were produced before the commissioners, under the signature of Lafon, bearing date 20th February, 1806, in which certificate he alleges himself to be a deputy surveyor under Isaac Briggs, surveyor general of lands south of Tennessee.

The certificate of survey states that the plat conforms to surveys executed by Andry, surveyor, in March, 1804, and those which he, Lafon, made in December, 1803, and makes the front twenty-seven arpents, and the depth extending back to the river Amite and Lake Maurepas.—(Senate Doc. No. 45, p. 6. See also plat D, hereunto annexed.)

The petition of Maurice Conway, and the proceedings thereon, were also produced.

Pursuing the order adopted in reference to the other tracts, I will now proceed to examine the conveyances offered to the commissioners in support of this branch of the title.

1. Conveyance from Maurice Conway to William Conway, bearing date 27th October, 1786, by which he conveyed to said William "twenty-seven arpents of front, more or less, with the depth according to the title of concession that his excellency Senor Count Galvez gave by his decree of the 21st June, 1777." By the same deed he also conveyed to said William eight arpents by forty in depth, acquired by transfer from the heirs of Landry, 18th October, 1776.—(See Senate Doc. No. 45, p. 10.)

2. Conveyance of Peter Part to William Conway, dated 27th March, 1791, by which he conveyed to said William, in exchange for other lands, "five and a half arpents of front, by the depth of forty arpents."—(Senate Doc. No. 45, p. 11.)

The only account I have been able to discover of the derivation of Part's title, is contained in the aforesaid certificate of Lafon, from which it appears that Conway claimed title to this portion of the lands included in the plat, under a conveyance of Maurice Conway to one Oliver Pollock, which it appears had belonged successively to a Dr.

Anderson and one Belsey *alias* Miro, who, having died, four and a half arpents in front by forty in depth had been purchased by Part from his testamentary executor, and exchanged with said Conway for other lands. It is by no means certain that this included the whole of the title vested in Pollock, as will be seen by a reference to the deed of Maurice Conway hereafter mentioned. The only one of these conveyances produced before the commissioners in support of the claim to this tract, was the above-named deed of Part to Conway. The certificate also states that William Conway claimed the rear lands as heir to his uncle. This is the substance of William Conway's title, according to the certificate under which he claimed the whole lands described in the plat.

In addition to the conveyances laid before the commissioners, I find among the papers annexed to the memorial of the heirs of Wade Hampton, a Spanish copy of a deed by Maurice Conway to Oliver Pollock, bearing date March 5, 1778, which conveys "thirty-six arpents front, and the depth as far as the lake."—(See Hampton's memorial, p. 21.)

Annexed to the memorial aforesaid is also a mortgage by William Conway, describing himself as heir of Maurice Conway, to Oliver Pollock, bearing date February 5, 1795, in which he describes the lands mortgaged as "thirty arpents of front, and depth as far as the lake."—(p. 23.)

There is also among the papers transmitted from the General Land Office what purports to be a Spanish copy of a conveyance or mortgage by William Conway to John Joyce, dated April 7, 1798, in which he describes the lands mortgaged as "thirty arpents of front, and the depth as far as the lake."

The commissioners appointed in pursuance of the act of the 2d March, 1805, and possessing no other authority than what is conferred upon them by its provisions, confirmed these claims. The decisions on the Conway and Clarke claims bear date respectively on the 3d March, 1806, and the decision on the Donaldson and Scott claim on the 10th of the same month.

The following is that on the Donaldson and Scott claim:

"William Donaldson and John W. Scott claim a tract of land situated in the county of Acadia, on the left bank of the Mississippi, about twenty-two leagues above the city of New Orleans, containing twenty-nine arpents in front, with the depth to the river Amite, bounded on the upper side by land of one Simonet, and on the lower by land of Daniel Clarke. It appearing to the board, from an instrument of writing exhibited, that said land was sold at public auction on the 12th day of August, 1798, before Evan Jones, at that time commandant of Lafourche, to Louis Faure, and it appearing, from sundry deeds of conveyance, likewise exhibited, that said land has become the property of the present claimant, the board do hereby confirm his said claim."

The other two are so nearly similar that it is considered unnecessary to give them.—(Senate Doc. No. 45, pp. 12, 16, 21.)

These decisions were made before one of the commissioners became a member of the board; and, as far as he was authorized to do so, he dissented from them.—(Senate Doc. No. 45, p. 6.)

Passing over, for the present, the consideration of the various acts of Congress subsequent to the decisions, it only remains, in order to exhibit a summary view of the case, to trace, as briefly as is consistent with a proper understanding of the subject, the action of the executive department of the government in relation to the claim, and especially of the General Land Office, and to examine into the circumstances under which the patents were issued, with the sole purpose of forming an opinion as to the legality of the authority assumed in granting them. In order to a better understanding of the subsequent proceedings, it is proper to remark, that the first two parcels above named were purchased by the late General Hampton, of South Carolina, prior to the issuing of the patents, and now appear to be claimed in common by Messrs. Preston and Manning, in the right of their respective wives, who were the daughters of said Hampton. The grantees of the Conway tract have also, as it would seem, conveyed their interest, which is now claimed by Mr. Rightor and others. No opportunity has been afforded to examine either of these conveyances.

On the 14th January, 1829, James P. Turner, then surveyor general, addressed a communication to Mr. Graham, Commissioner of the General Land Office, inclosing to him a rough plat of the tract claimed, showing its locality and extent, and that it interfered in part with other grants by the Spanish government, in which he says, that "the Spanish government did (previously and subsequent to the date of this grant) make other grants to a number of individuals within the limits now pretended to be covered by the grant of Conway; and, further, I believe it will not be denied that there never was any pretensions made for the present extent of the claim until after the right of the land in question became vested in the United States. And there is still another reason why this grant cannot be extended to the Amite river; that is, the petition of Conway, the decree of the governor, nor the proceedings of the surveyor, call for nor exhibit no such boundary; and it is a fact well known that it was the custom of the Spanish surveyors, in all cases where the grant called for specified boundaries, to exhibit such boundaries in their plat of survey. He also suggests that, if governed by the customs of the Spanish government, which he presumed could alone be the guide, he should commence at a certain point, run General Hampton "off such depth as would carry us back on the upper line, until it will intersect an older grant marked B, which appears to be strictly conformable to the decree of the Spanish governor, although this will not give the claim a depth of eighty arpents on the upper line, which I believe it was designed to have if found to be vacant." And he requests instructions.—(Sen. Doc. No. 45, p. 24.)

To this letter Mr. Graham replied on the 17th February, 1829, and expresses the opinion that the grant is so vague in its terms, as to boundary and quantity, that it will be necessary for the courts of justice to interfere, for the purpose of defining and designating both; and that it is impossible the courts can sanction the boundaries as claimed. He says, "the object and purpose for which the grant was asked and obtained will, therefore, be the leading considerations on which the courts will probably decide the question; and, in so deciding, they possibly may limit the grant either to the limits of the survey actually

made by Louis Andry, or to the termination of eighty arpents, the usual extent granted when the front grant was deficient in timber or otherwise; or to the distance of one and a half league, as required in the petition. Should the court assume any of these limits, facts and circumstances may possibly occur in the investigation of the subject that may induce it (the court) to extend the back line so as to be equidistant from any part of the river. If, therefore, in making your surveys, you assume this limitation (to wit, a league and a half,) as the extent of the grant to Maurice Conway, dated the 21st June, 1777, I think that we shall have given full scope for the court to exercise its discretion; and if the grant can be so adjudged as to exceed those limits, then it must extend to the utmost boundary of Louisiana, as they existed at the date of the grant, and to which the two described lines can be extended." He further states that the decision of the commissioners can only be considered as recognizing the validity of the grant as a complete title, and not as confirming any other lands than those included in its terms; and directs the surveyor general, in laying down the tracts on his plat, to designate the boundaries as far as Andry surveyed by black lines, as also the confirmed claims interfering with it, and to delineate the residue of the tract by dotted lines.—(Senate Doc. No. 45, p. 26.)

Mr. Graham having thus decided that a league and a half in depth was not open to entry, and given directions acccordingly, the lands in the rear, between that and the Amite river, seem to have been treated as public lands, and numerous sales of them were made at the district land office.

The views of Mr. Brown, the successor of Mr. Graham, are also very clearly stated in his letter of the 17th June, 1836, addressed to the register at New Orleans. This communication appears to have been prepared in consequence of one received from Mr. Preston, wherein he applied for a patent; or in case one should not be issued, he requested that the lands within the limits of the claim should be withheld from sale, and that patents should not be issued for the parcels sold. Responsive to these requests, as it would seem, Mr. Brown says to the register, "that although this office cannot recognize the claim as confirmed, under any circumstances, to the extent contended for by the parties interested, yet, as the law prohibits the sale of any lands to which a claim was filed in due time * * *, the sale of any portion of the land within the limits claimed * * * is unauthorized." He therefore instructs him to withhold all lands within the lines claimed from entry, and to send an abstract of the sales made, that the issuing of patents may be prevented; and directs him, in case he should deem it necessary, to procure from the surveyor general a diagram showing the lands included in the grant as claimed before the commissioners.—(Senate Doc. No. 45, p. 28.)

On the same day he also addressed a communication to Mr. Nicholas, then one of the senators from Louisiana, by whom the letter of Mr. Preston had been sent to him, stating that, inasmuch as he did not consider the claim as recognized by the United States to the extent claimed, he could not issue a patent, but had directed the register to withhold the lands from entry.—(Senate Doc. No. 45, p. 28.)

In 1837, Mr. Preston again applied to the General Land Office, alleging that the land officers at New Orleans had permitted preëmptions and floats to be located on the land, and requested them to be cancelled.—(Senate Doc. No. 45, p. 29.)

The papers in the case were thereupon submitted by Mr. Whitcomb, the then Commissioner, to Mr. Birchard, the Solicitor of the General Land Office, who, on the 2d December, 1837, gave his written opinion that the claimants have "no legal title or equitable right whatever to any land without the bounds of the tract heretofore surveyed for them, as derived from the Spanish government, from the Indians," or from the United States; and that the parties who had purchased had acquired an equitable, if not a legal, right to demand that their titles should be perfected; and suggested to the Commissioner that he should recommend to Congress to quiet all doubt about the titles of the purchasers by a special act.—(Senate Doc. No. 45, pp. 40, 42.)

On the 27th December, 1837, the memorial of Mr. Preston, in behalf of the heirs of General Hampton, before referred to, was presented to the Senate, in which he prays that the Commissioner of the General Land Office should be directed to refuse titles to those who had purchased by preëmption or otherwise, by refunding the money paid and taking up the certificates of entry as far as possible; as, also, that he should be directed forthwith to issue a patent for the whole of the claim. This memorial was ordered to be printed on the 29th January, 1838, and is Senate Doc. No. 144, second session Twenty-fifth Congress. The Journal of the Senate shows that the Committee on Private Land Claims, to whom it had been referred, were discharged from the subject on the 7th July, 1838.

It next appears that Mr. Secretary Woodbury, on the 14th February, 1838, made a communication to the Senate respecting land claims in Louisiana, containing a report from Mr. Whitcomb, in which the latter concurs in the aforesaid conclusions of Mr. Birchard with respect to the claim.—(See Senate Doc. No. 197, second session Twenty-fifth Congress, p. 2.)

Nothing further seems to have been done in the case until the 19th March, 1839, when an application was made in behalf of some of the purchasers from the government for patents, and suggesting, also, that the land officers should be directed to receive payment from the preëmptioners who had presented the evidences of their claims.—(Senate Doc. No. 45, pp. 43, 48.) This application being referred to the Solicitor, he, on the 20th March, 1839, ahered to his former views, and expressed the opinion that the purchasers were entitled to patents. He, however, advised the Commissioner, as the question was important, and his predecessor had disagreed on the subject, that he should ask the opinion of the Attorney General and the direction of the Secretary of the Treasury.—(Senate Doc. No. 45, p. 48.)

Mr. Whitcomb, accordingly, on the 3d April, 1839, submitted the matter to Mr. Woodbury, the Secretary of the Treasury.—(Senate Doc. No. 45, p. 49.)

It is evident from the communication of Mr. Whitcomb of June, 1839, to the counsel of the parties applying for patents, as well as by the letter-book of this office, that the question in some form was submitted to Mr. Grundy, the then Attorney General.—(Senate Doc. No.

45, p. 44.) In his letter of the 16th May, 1839, returning the papers to the Secretary of the Treasury, Mr. Grundy says: "I have had a full and free conversation with the Commissioner of the General Land Office, and we concur in the opinion that Congress alone possesses the power to make a fair and just disposition of the subjects in controversy; that much public mischief might arise should the executive branch of the government proceed to act at this time; and that Congress should be applied to at an early day in the next session to take such measures as justice to the respective parties may demand. Believing this to be the most correct and judicious course, I herewith return the papers relative to these two cases which were transmitted to me, at the same time assuring you that, should you think the public interest would be promoted by an earlier action on the subject, upon your giving me an intimation to that effect, and furnishing me again with the papers, I will promptly transmit to you such opinions as in my judgment the law of the respective cases will warrant."

It does not appear that any special report was ever made by the Commissioner of the General Land Office, but the Senate having before them the communication of Mr. Woodbury, of the 14th February, 1838, and the opinion of Mr. Birchard, with respect to this claim, which was transmitted at the same time, ordered the petition of Wade Hampton to be taken from the files, and referred to the Committee on Private Land Claims. (Senate Journal, 1st Sess. 26th Congress, p. 40.) In pursuance of this referrence, the committee reported a bill, No. 361 of that session, which proposed to confirm the claims made by Donaldson and Scott, and Clarke and Conway, "to the extent of two leagues fronting on the Mississippi, and running back for quantity," which was read the first time. No further action appears to have been had on this bill, and it never became a law.

The counsel for the purchasers from the government having again applied to the Land Office for patents, the Commissioner, on the 3d October, 1840, addressed a communication to the Secretary of the Treasury, giving further explanation in regard to the claim, in which he states the reporting of the bill above-mentioned, limiting it to two leagues fronting on the Mississippi, and running back for quantity, and that this "must be understood as two leagues superficial measure," and that it furnishes an indication that the claim was not considered of greater extent. He further states, that the purchasers of the back land were desirous that patents should issue to them, and others residing on different portions of it were anxious the same should be brought into the market. He therefore requests instructions in the premises, suggesting, as but a short time would elapse before the next session of Congress, whether it would not be better to defer any further steps until opportunity was afforded for legislation. (Senate Doc., No. 45, p. 53.) And Mr. Woodbury concurred in this suggestion.—(Page 54.)

It further appears, by a communication from the register of the land office at New Orleans, of the 13th February, 1841, that Mr. Rightor applied to him for three patent certificates, in the names of Donaldson and Scott, Clark, and Conway, and produced plats to him, drawn by H. T. Williams, then surveyor general of Louisiana, and certified by

him, that having referred to the letters of Mr. Graham and Mr. Brown, he had been led to the opinion that the claims were never considered as definitely confirmed; and that, under these circumstances, he had declined issuing the patent certificates, and he requests instructions. (Senate Doc. No. 45, p. 54.) In reply to this letter, Mr. Whitcomb, on the 30th June, 1841, requested the register to defer any action on the application to issue patent certificates, until he should be instructed on the subject by the department.—(Page 55.)

It appears, however, that in the meantime an application was made to the register at New Orleans for certified copies of the proceedings before the board of commissioners who had confirmed the claim, and that on the 12th June, 1841, the register had furnished them in the cases of the Donaldson and Scott and Clark claims. He certifies in the case of the first-named parties, as follows: "that the document just above written is a full copy of the decision of the late board of commissioners, for the eastern district of the late Territory of Orleans, on the claim of William Donaldson and John W. Scott, as taken from the decisions on land claims of said board in this office." He also certifies "that the foregoing plat of survey, (Lafon's plat,) and the several other documents produced in evidence in support of the claim, are true copies taken from the records in my possession, and forming part of the archives of this office." (Senate Doc., No. 45, p. 21.) The certificate on the proceedings in the case of the Clark claim, is in the same terms, (page 16.) That in the case of Conway is dated 16th September, 1841, and is also similar, (page 12.) It is alleged that these are *certificates of confirmation* within the true meaning of the acts of Congress relating to land claims in the Territory of Orleans. This point is one of considerable importance, and will be examined when I come to consider whether the patents were issued in pursuance of a lawful authority.

It also appears, that H. T. Williams, surveyor general of Louisiana, on the 6th July, 1841, certified from field notes of various surveyors on file in his office, plats and certificates of survey for the Donaldson and Scott and Clarke claims, carrying the boundaries to the Amite river, but excluding lands claimed under other grants. The Donaldson and Scott claim he certified to contain 36,582 acres, and that of Clarke, 28,117 acres.—(See certificates of survey, Senate Doc. No. 45, pp. 22, 23, and plats E and F, hereto annexed.)

On the 9th August, 1841, Mr. Isaac T. Preston, one of the counsel of Rightor, the claimant of the Conway tract, made an application to the Commissioner of the General Land Office, producing certain documents, and claiming a patent under an act of the 18th April, 1814. He also presented an answer to the report of Mr. Birchard. (Senate Doc. No. 45, p. 35.) These papers appear to have been referred to the Solicitor of the General Land Office, Mr. Hopkins, who, on the 30th September, 1841, expressed the opinion that the title was valid, that the extent of the claim was legally substantiated, and "with some hesitation," decided that the act of 18th of April, 1814, confirmed the claim, and that the claimants were entitled to a patent for the quantity of land confirmed to them by the board of commissioners.—(Senate Doc. No. 45, p. 35.)

The application of Mr. Preston, the report of Mr. Hopkins, and other documents, were transmitted by Mr. Huntington, Commissioner of the General Land Office, to Mr. Forward, then Secretary of the Treasury, on the 14th February, 1842, requesting that the opinion of the Attorney General might be taken. (Senate Doc. No. 45, p. 89.) Before any opinion however was given, the papers were returned to the Land Office, no doubt with a view to procure a statement of the case; and on the 9th August, 1842, Mr. Blake, the successor of Mr. Huntington, again transmitted them in a communication to Mr. Young, Acting Secretary of the Treasury, giving a "history of the facts," and propounding certain questions for consideration, as to the extent of the grant, and whether the act of the 18th April, 1814, was applicable to and confirmed the claim. (Senate Doc. No. 45, p. 94.) The papers, it seems, were again sent to Mr. Legaré, then Attorney General, whose first action upon the subject was to submit to Mr. Blake the following important inquiries:

1. Whether "a patent has ever been granted on any complete rench or Spanish title, beyond the extent of one league square, within the Territory of Orleans?

2. "Whether any certificates of confirmation have ever been issued by the commissioners, on complete titles as aforesaid, beyond the extent of one league square?"

Mr. Blake replied to the *first* in the negative, so far as he had been able to ascertain by a cursory examination of the records. In explanations that followed, he deemed it proper to mention, that in the case of Miller and Fulton, confirmed by the act of the 29th April, 1816, Mr. Graham recognized the right of the claimants to a confirmation for a league square for each tribe of Indians from whom they purchased, and the patent was granted accordingly. The case is not stated as an exception to the general answer in the negative, and an examination of the whole communication to which I refer will show that it cannot be regarded in that light. He also answered the *second* in the negative, and gave some explanations. (Senate Doc. 45, p. 101.) About the same time, the counsel for some of the purchasers under the government made an application for patents, or to have their entries cancelled, and Mr. Preston made a representation upon the subject, in which he insisted that the aforesaid order of Mr. Brown was merely prospective in its operation, leaving the unlawful occupants in full and quiet possession, and that they subjected the land, timber, &c., to depredation, and therefore requested that they should be notified and warned of their true condition.—(Senate Doc. No. 45, p. 103.)

Mr. Legaré, on the 2d September, 1842, considered the question whether the land within the limits of the claim was subject to entry, and communicated the following opinion to the Acting Secretary of the Treasury:

"There can be no doubt, in my opinion, that the sales made to preemptioners within the (admitted or ascertained) limits of the Houmas claim, are entirely void under the 6th section of the act of 1811. But Commissioner Graham's order proceeded on the assumption that the lands he offered for sale were not included within the bounds of that

claim. Commissioner Brown, without conceding its validity to the whole extent, seems to have admitted that it had been regularly preferred before the commissioners to that extent. I am not yet prepared, from any information I possess, to speak to this fact. I only answer hypothetically, assuming the lands in question to be within the claim as propounded to the commissioners under the acts of 1805, 1806, and 1807. The executive clearly had no authority to dispose of them without a special act of Congress. The Land Office will therefore refuse patents on all certificates which they shall be satisfied fall within that category. Whether the entries not heretofore patented shall be cancelled, depends upon the practice of that office, which must have been, I should think, settled long ago, and which I do not wish or mean to disturb.

As to patents issued by Mr. Graham, I see no remedy but in the courts. If issued on lands covered by a complete Spanish grant, they are, of course, *void*, and will be so declared whenever they shall be set up in an ejectment. I should have greatly preferred to retain my opinion on this as on the other points of this case for fuller consideration, and give it now only because it seems to be impatiently called for by the claimants." (Senate Doc. No. 45, p. 104.) No opinion was ever given by Mr. Legaré on the other points submitted, as to the extent of the grant, or whether the claim had been confirmed by the act of the 18th April, 1814.

Whilst the case was pending before Mr. Legaré, Mr. Blake addressed a letter, on the 7th October, 1842, to Mr. Newcomb, the surveyor general, in which, after stating that he finds a plat in his office certified by Mr. Newcomb, representing a survey of the Conway portion of the claim, he says that the extent was not finally settled, nor was the surveyor authorized to decide that matter, nor to approve of a survey, until the question was determined, and instructions given him; and concludes that, until the Attorney General should decide the question, the case must be considered as suspended. (Senate Doc. No. 45, p. 105.) Mr. Blake also addressed another letter to Mr. Newcomb, on the 8th November, 1842, on the subject of certain complaints made against him by persons representing themselves as residents on the Amite and Blind rivers, respecting the certificate given by him to the survey of the Conway tract, in which Mr. Blake states that he had been and was disposed to believe that, at the time, the surveyor general was not aware of the instructions of 1829 and 1836, and of the fact that the question of limits had not been finally determined by the proper authorities.—(Senate Doc. No. 45, p. 106.)

On the 20th January, 1843, Peter Laidlaw, the register at New Orleans, issued patent certificates in the Donaldson and Scott, and Clarke claims, and advised the Commissioner of the General Land Office thereof. The certificate in the first mentioned claim is as follows:

"It is hereby certified, that, in pursuance of the act of Congress passed on the 18th day of April, 1814, entitled 'An act concerning certificates of confirmation of claims to land in the State of Louisiana,' William Donaldson and John W. Scott have been confirmed in their claim to a tract of land situated in the county of Acadia, numbered 133 in the report of the board of commissioners for ascertaining and

adjusting the titles and claims to land within the eastern district of the Territory of Orleans, dated at New Orleans, the 4th March, 1806, designated as (here the sections are described) containing 36,582 19 acres, as per plat herewith. Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said William Donaldson and John W. Scott shall be entitled to receive a patent for the land herein described." The certificate in the case of the Clarke tract is similar in its character.—(Senate Doc. No. 45, p. 125, and plats E and F hereto annexed.)

Mr. Blake, on receiving the letter of the register advising him of the issuing of these certificates, wrote in reply under date of the 10th February, 1843, stating that, by a letter of the 10 June, 1841, his predecessor had been requested to defer the issuing of a patent certificate until he might be definitively instructed by the department, and says: "In view of that communication to the register, I am surprised to learn that you have issued the certificates you mention; and, as questions connected with the confirmation and limits of the Houmas claim have been submitted to the supervisory power, and have not yet been definitively settled, you will recall those certificates, and suspend them until you receive further advice from the department." (Senate Doc. No. 45, p. 106.) He also advised Newcomb, the surveyor general, on the 28th of July, 1843, that he was not authorized to give an official sanction to any plat without definite instructions from the department.—(Senate Doc. No. 45, p. 111.)

Some of the purchasers from the government having applied to the General Land Office, in March, 1843, that the sales to them might be cancelled, and the purchase-money refunded to them, Mr. Blake submitted this subject to Mr. Spencer, then Secretary of the Treasury, on the 7th June, 1843. (Senate Doc. No. 45, p. 108.) Mr. Spencer accordingly examined the question submitted to him, and on the 24th July, 1843, communicated his decision to Mr. Blake, in which he states "that, admitting that Commissioner Graham was wrong, that the sales in question were unauthorized and void, yet the money paid is in the treasury, and it cannot be taken out without an application to Congress. The act of 12th January, 1825, authorizes this department to refund only when the United States has no *title* to the land sold, and that act does not reach this case; because, if the money is ordered to be refunded, that order must proceed on the ground that the Houmas title over the land in question is good. I cannot and will not decide that question. But I do not admit that Mr. Graham was wrong, and that the sales in question were unauthorized and void. The third section of the act of 3d March, 1811, I am inclined to think, had no other effect than to suspend the executive power to offer for sale lands to which claims had been duly preferred, until the final decision of Congress thereon. From the date of the confirmatory act, all lands lying without the limits of the claim, as confirmed, would be relieved from that suspension, and become *public lands*, and subject to preëmption rights attaching to public lands. The validity of these sales, therefore, depends on the decision of the question, 'when and with what limits has the Houmas claim been confirmed, if confirmed at all?' And, until that question is settled, no money can, under existing laws, be drawn from the

treasury for the purpose of being refunded on account of these sales; the power to refund, under the act of 1825, depending in this case on the conflict of these sales with the Houmas claim as a valid and legal title, and not because they were made in violation of the act of 1811, as alleged." He, therefore, was of opinion that there was no authoriy in the department to refund the money claimed.—(Senate Doc. No. 45, p. 110.

The counsel for the purchasers, it appears, addressed a communication to Mr. Spencer, on the 12th August, respecting his decision declining to refund the purchase-money, which is not among the papers sent me. To this communication, Mr. Spencer replied, on the 28th August, 1843, as follows: "The case is briefly this: the Secretary of the Treasury is authorized by law to refund the purchase-money for erroneous sales of land only where the United States had no *title* to the lands sold. Whether this department can, in this case, regard the United States as having had *title* or not, depends on the decision of the question, whether the 'Houmas claim' has been confirmed by law, or its validity judicially established; and if so, to what extent? The power of this department to refund, in this case, depending on the conflict of these sales with the 'Houmas claim,' so ascertained and decided to be valid, I know of no 'confirmation or other legal establishment' of the Spanish grant to Houmas. It is because the question of title is to be determined by the courts, that I refuse to decide it. There may be a cloud upon the title of the United States which justifies the General Land Office in declining to issue a patent, and yet the want of title may not be so clear as to justify the Secretary of the Treasury in refunding the money. I have no doubt as to the meaning of the act of January 12, 1825, the only law authorizing the Secretary of the Treasury to refund in cases of erroneous sales of lands. The Secretary of the Treasury is authorized by that act to refund only in cases where the purchase is or may be void, the United States having *no title* to the lands sold: 1st, by reason of a prior sale; or, 2d, because of the right thereto having vested elsewhere under a *prior* British, French, or Spanish grant, recognized by confirmation by Congress, or its validity otherwise legally established; or, 3d, from *want of title* thereto in the United States from any *other* cause whatsoever. It is for *want of title in every case*. For *such* erroneous sales he may refund, and for such only, under that act. Or, in other words. Congress has intrusted to the Treasury Department the power to refund only where the sales were *absolutely void* for want of *title* in the United States; but where *voidable* only against the United States, it has reserved to itself the power either to confirm the sales or to refund the purchase-money; or, at all events, it has not granted it to the Treasury Department.

"As to the alleged issue of 'patent certificates' for the 'Houmas claim' to its full extent, which you seem to regard as conclusive on the question of *title*, I have to remark that, whatever has been issued purporting to be a 'patent certificate,' has been issued not only without the authority, but against the express instructions of the Commissioners of the General Land Office, and that a knowledge of the erroneous and unauthorized issue is believed to have been brought home to the holders. Even if the 'Houmas claim' were confirmed, whether patent certificates,

or even a patent, could in that case rightfully be issued therefor, (and, of course, if issued, their legal effects as such,) would depend on the fact whether there was any *provision* of *law* authorizing the issue of such evidences of its validity; and this department can recognize nothing purporting to be a 'patent certificate' as having any effect whatever on the question of title, until it first appears that it is authorized by *law* to be issued *for this claim*, and that it has been regularly and fairly issued.

"I am of opinion, however, that the act of April 18, 1814, to which you refer, authorizes 'patent certificates' and patents to be issued only for claims to tracts not exceeding a league square, which, by the act of March 3, 1807, the commissioners had power finally to decide, and did so decide; and that, of course, it has no application to the 'Houmas claim,' which was submitted, in pursuance of law, to Congress for its final decision.

"I regard Mr. Wirt's opinion, to which you refer, as having but little bearing on this case; it is founded on the admission that there was no authority in that case to sell, the land having been excepted from sale by act of Congress. In this case, however, I am inclined to think that the acts of 1806 and 1811 merely *suspended* action until the final decision of Congress on the claims; and that, in sales made after the confirmation of the 'Houmas claim,' within its limits as claimed before the commissioners, but without its limits as confirmed by Congress, there would be no want of authority to sell. But, however that may be, this department is not authorized to refund money for sales *erroneously merely*, but only for sales erroneous *because* the United States had *no title* to the lands sold. If, therefore, these sales were clearly unauthorized, still this department has no power to refund until it is ascertained whether the United States had or had not *title;* or, in other words, whether there has been a 'confirmation,' or other legal establishment of the 'Houmas claim,' and to what extent; and if so, in what cases the sales conflict with it."—(Senate Doc. No. 45, p. 112.)

Mr. Spencer, on the 15th November, 1843, addressed a further communication to another counsel of the purchasers, in which he states, "that the claim which he had decided was disposed of on the assumption contended for—that Commissioner Graham was wrong in making the sales, and that they were unauthorized and void. Assuming the ground that the act of 1825 would not authorize the Secretary of the Treasury to refund, except another point was settled by him, viz: that the United States had no title. This I refused to decide. Now, all this had nothing to do with determining the limits of the Houmas claim, be they more or less. That claim has been confirmed to a certain extent, or it has not. If not at all, then the title of the United States is not shown to be defective as to any part; if confirmed to a certain extent, and the sales by Commissioner Graham were without the limits of the claim as confirmed, they were authorized. But I have not determined, nor will I undertake to determine, to what extent the Houmas claim has been confirmed. This is for the courts of law or Congress to decide." (Senate Doc. No. 45, p. 114.) He afterwards returned the papers to the General Land Office, with a copy of his

communication above mentioned, so that the Commissioner might see what disposition had been made of the claim.—(Page 113.)

There the matter seems to have rested until the 26th of May, 1844, when the counsel for the heirs of Hampton addressed a communication to the President, which he referred to the Commissioner of the General Land Office, and directed him to examine the case and give a condensed view of all the facts in writing. This communication and reference are not among the papers, but are mentioned in the report made in pursuance of the reference.

On the 28th of the same month, the counsel also addressed a letter to Mr. Blake, requesting that patents might be issued, and that as an application of a similar character had been made some time before, when the embarrassments that existed were such that the Commissioner did not feel authorized under the circumstances to issue patents, and, as he might feel an unwillingness to give the final decision without the advice of the Secretary of the Treasury or the Attorney General, he, the counsel, had no objections, but, on the contrary, should desire their opinion, and should be pleased if the application with the papers in the case were submitted to them. (Senate Doc. No. 45, p. 115.) He also inclosed an opinion by Mr. McDuffie and Judge Huger, of South Carolina, in which they express the opinion that the parties are clearly entitled to the patents under the act of 18th April, 1814, (page 120.) In consequence of this request, Mr. Blake, on the same day, submitted this application to Mr. Young, Acting Secretary of the Treasury, for the opinion of the Attorney General, and his instructions.—(Page 116.)

On the 5th June, 1844, Mr. Blake also made the report requested by the President, in which, after reciting the case, he states as follows: "In Mr. Johnson's letter to you, he refers to the act of 12th April, 1814, as requiring patents to be issued for claims not exceeding a league square, and to the act of 18th April, 1814, as, 'requiring patents to be issued on all claims which are included in the transcript of decisions made in favor of claimants, and transmitted to the Secretary of the Treasury,' states that, by these two laws, all the claims should be patented when surveyed, which had been confirmed by the board of commissioners; and suggests that an order be given to issue patents in all such cases, when the requirements of the law are complied with. For claims confirmed by the act of 12th April, 1814, this office, on the presentation of the confirmation certificates required by this act, with the approved plats of survey, is prepared and will promptly issue patents in all cases that are regular and free from difficulty; but as to the act of April, 1814, the decision of the late Secretary confines the act to cases not exceeding a league square. The question, however, as to whether it is coextensive with every claim favorably decided on in the transcripts, is now *sub judice* by the late submission of the papers to the Secretary of the Treasury *ad interim*, and a final decision on that point by the Executive will of course govern the action of this office." This report was not among the papers sent me, but was furnished by the counsel of the claimants.

The counsel for the claimants having filed an argument in support of the authority to issue patents, which will be found in the Senate

document before referred to, (page 117,) Mr. Secretary Bibb, on the 13th August, 1844, transmitted to Mr. Blake his decision, that patents ought to be granted on the Donaldson and Scott, and Clarke claims, and that persons who had been permitted to enter lands within the boundaries of the three claims should have a return of the moneys paid by them according to the principles of an opinion before given by him.—(Senate Doc. No. 45, p. 126.) A copy is also hereto annexed.

In pursuance of this decision, the Commissioner of the General Land Office prepared the drafts of two patents, in the nature of quit claims, for the Donaldson and Scott, and Clarke tracts, according to the form used in the office in similar cases. The counsel for the claimants, however, objected to certain clauses in the forms prepared, and on the 28th August, 1844, the matter was submitted to the Secretary of the Treasury. The grounds of the objection were, that in the proposed conveyance by the United States it was declared, that it should be "subject to any just claim or claims, to all and every part thereof, of all and every person or persons, bodies politic or corporate, derived from the United States, or from either the British, French, or Spanish authorities," and that the habendum was made "subject to any just claim or claims as aforesaid," and "so that neither the United States, nor any other person claiming under them, except as is provided in said act and the reservations aforesaid, may or can set up any right or title thereto." The Secretary of the Treasury directed these clauses to be omitted in the patents.—(Senate Doc. No. 45, p. 132.)

The patents were accordingly issued, and bear date on the 22d day of August, 1844, and are signed by the President, and not by his Secretary. Having been transmitted to the counsel of the claimants on the 28th August, 1844, he, on the 19th October following, acknowledging their receipt, entered a caveat, that in receiving them for a portion, the claimants do not relinquish their right, title, or claim, to the residue; but, on the contrary, they will assert and maintain their right to the entire extent of the original claim.—(Senate Doc. No. 45, page 134.)

The Donaldson and Scott, and Clarke tracts having thus been patented, two several applications were made in September and October, 1844, for a patent for the Conway claim. (Senate Doc. No. 45, pp. 134, 135.) And the surveyor general was afterwards instructed to furnish the register with a plat in accordance with the decision of the Secretary of the Treasury. The register was also advised of the decision.—(Pages 137, 138.)

The certificate of survey and plat were accordingly made by the surveyor general, in this case, and bear date the 25th November, 1844, and they, together with the patent certificate, were transmitted by the register to the General Land Office on the 7th December, 1844.—(See annexed plat, marked G.)

Before, however, the return of the plat and patent certificate to the General Land Office, a resolution passed the Senate on the 10th December, 1844, directing the Secretary of the Treasury to communicate a copy of his written opinion, directing patents to be issued, with copies of the opinions given by the other officers connected with the General Land Office in relation to the claim, together with copies of the sur-

veys, and of the transcripts of confirmation. (Senate Journal, p. 28.) These papers were accordingly transmitted to the Senate on the 8th January, 1845, and compose Senate Document No. 45, so often referred to.

On the 7th day of January, 1845, the following joint resolution was passed in the House:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the issuance of grants or other evidences of title upon a Spanish land claim in the State of Louisiana lying on the Mississippi above New Orleans, commonly known as the Houmas claim, be, and the same are hereby prohibited until the further order of Congress in relation thereto."

This resolution having been sent to the Senate on the same day, was there amended, so as to read in terms similar to the joint resolution of 1846, under which this xamination is made. This amendment was sent to the House on the last day of the session, but was not taken up, and therefore failed to become a law. In consequence of these proceedings, Mr. Blake seems to have held the case suspended.

On the 5th March, 1845, a communication was received at the General Land Office, in behalf of the claimants of the Conway tract, inclosing a letter from one of their counsel to the President, dated March 3, 1845, requesting him to direct the Commissioner to issue a patent in conformity with the decision made by the Secretary of the Treasury. With that letter is a note from the Secretary of the same date, stating that the three claims "are confirmed, and therefore patents ought to issue, if not already issued, conformably to the opinion" delivered by him. Under this note is an order of the same date from the President, requesting the Commissioner to "issue patents in conformity with the above recommendation and opinion of the Secretary of the Treasury." But Mr. Blake still deferred action on the case.

On the 12th May, 1845, another application for a patent was made by Mr. Isaac T. Preston, as counsel for the claimants, to Mr. Shields, the successor of Mr. Blake, who on the 24th June following, submitted the same with a report to Mr. Secretary Walker, in which he states, that under the decisions of the Supreme Court, he feels bound to regard the grant as within the scope of the authority of Galvez, and as lawfully executed by him, but that the question still remains as to the extent of the grant. On this point, after stating the answer in behalf of the claimants to the opinion of Mr. Birchard, he says: "It is then admitted that there was no actually defined rear boundary to the Houmas, but under the Spanish usages a navigable water course is claimed as that boundary. Mr. Graham was of opinion that the boundaries of the grant must be fixed by the courts, and in order to give scope for their discretion, limited the survey of the rear line to a league and a half, thereby giving upwards of 18,000 acres to the claim. * * * Looking to the object for which the grant was asked, I feel constrained to say, that I cannot decide that the usages of the province authorized such an extension, or that Galvez contemplated a grant for such an extent of territory, but must agree with Commissioner Graham and Secretary Spencer, that the rear boundaries should be determined by the courts or by Congress." He further states, that

he cannot satisfy himself that the act of 18th April, 1814, has reference to any cases except those on which confirmation certificates were authorized to be issued for claims to the extent of a league square; concurring on this point also with Secretary Spencer, and answering the question what was required of the executive officers under existing laws in regard to this claim, he states, that under the provisions of the act of 3d March, 1811, the land to the extent claimed should have been reserved from sale until the final decision of Congress. The act referred to declares, "that till after the final decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the Register of the Land Office, and filed in his office, for the purpose of being investigated by the commissioners appointed for the purpose of ascertaining the rights of persons." The report continues, that "by this course the claimants would be left to their original grant on which to rest and defend their rights under the supreme law of the land, and the Executive in any future proceedings would be governed by the decision of Congress, and of the courts;" and alluding to the directions of the former Secretary of the Treasury, and the President to issue a patent, he requests instructions on the subject.

The joint resolution directing the Attorney General to make this examination, having subsequently passed, Mr. Secretary Walker has suspended the giving of the instructions requested.

On the 6th June, 1846, the Senate passed a resolution directing the Commissioner of the General Land Office to furnish certain information respecting the Donaldson and Scott, and Clarke claims, the nature of which will appear from the answer of that officer.—(Senate Journal, p. 329.)

On the 10th June, the Commissioner made his report, which on the 12th was ordered to be printed.—(Senate Doc. No. 389, 1st session, 29th Congress.)

It appears by that report that the number of acres in these two tracts, according to the claim is	82,111.00
The aggregate of acres embraced in the two patents is	64,699.79
The difference about	17,411.21

The seventeen thousand acres of the claim which was thus excluded from the patents are represented to be situated on the Iberville, or Manchac, and Mississippi rivers, and to be embraced in other private claims, and the report refers to the blue color, on plat H, to exhibit their location. It states that the number of patents issued for lands purchased within the limits of this claim, as patented was twenty, containing 2,739.48 acres, that eleven of these patents had been surrendered to be cancelled, and that the amount of the purchase money refunded thereon was $2,163 12½; that the number of entries upon which application had been made to refund the purchase money, since the issuing of the patents, was one hundred and four, containing 17,002.83 acres, and that the amount refunded was $21,253 54. By a

statement among the papers, it appears that the total number of acres entered under preëmptions and otherwise in the three tracts, and the purchase-money received thereon, were as follows:

Acres	40,253.75
Purchase-money	$50,327 32

I regret that I have not found it consistent with a proper understanding of the subject to abridge this narrative within narrower limits. Its length has much exceeded my expectations. It was, however, in some degree unavoidable, in order to present a clear view of the case to the President, on whom important duties are devolved by the joint resolution, in the event that my opinion should be adverse to the authority assumed in granting the patents. If any errors have occurred in selecting what appeared to be material, a reference to the source from which I have drawn will at once correct them.

I will now proceed to examine the legal questions on which I am directed to report my opinion.

In the first place, I am of opinion that the grant by Galvez to Maurice Conway is a perfect and complete grant, duly made and consummated before the cession of Louisiana to the United States, protected by the treaty of cession, and, in the language of the Supreme Court, in the case of the United States *vs.* Wiggin, (14 Pet., 350,) is "intrinsically valid, and needs no sanction from the legislative or judicial departments of this government."

The great question to be determined, however, as before remarked, is the extent of the lands which were severed from the domains of the crown of Spain by the terms of the grant; or, in other words, the limits and boundaries of the tract secured, and guarantied by the treaty.

The claimants contend that it includes not only the lands surveyed and severed, but all the rear lands above described, as far as the rivers Amite and Iberville and lake Maurepas. It must be admitted that the language of the petition is somewhat broader than the survey and location. But, if there were no other means of identifying the land, or of ascertaining the limits, than are to be found in that source, I would be compelled to hold that the whole proceedings are so vague and indefinite that the grant must be considered void on that account. It is insisted that the words of the grant are so fully explained and qualified by the general expressions of the preamble, decree, and petition, as to avoid all such uncertainty, and manifestly to authorize such an interpretation of the terms of the grant, and of the description therein of the land granted, as will give to the grantee, and those claiming under him, all the domain in the rear of the first concession, belonging at that time to the government of Louisiana. In furtherance of this view, it is insisted that the several papers, when considered together as parts of one transaction, will admit of no other limitation than the one assumed, which extends the depth to the boundaries of the province. This cannot be admitted, it seems to me, without overlooking entirely the first action of Unzaga upon the petition of Conway, in which he directs *the setting and marking of the boundaries;* nor without rejecting altogether the essential parts of the

official survey, made in pursuance of that order, and constituting the most important element of the proceedings upon which the final decree or grant was based. After full consideration of the question, I dissent from the views of the claimants, and have come to the conclusion that, by the terms of the grant and preliminary proceedings upon which it is founded, a complete legal title vested in the said Conway only to the extent of the survey, making the side lines forty-two arpents in the depth, or half a league from the front on the Mississippi river.

In forming this conclusion, I have not been unmindful of the importance of the suggestion that the evidences of title, in this case, are not to be measured by the strict, though just and certain, rules of the common law, but should be considered in connection with the usages and customs of the province prevailing at the time when the grant was made. The propriety of the suggestion is freely admitted, and has been fully weighed. It led me to examine whether there was any recognized usage or regulation which could come in aid of the proceedings to expand the legal rights of the party beyond the survey and well-defined location upon the land. No case has been cited disclosing any such custom, usage, or regulation; and it is presumed none can be found, where the principle has been approved by the courts of the United States. Until that principle shall have been sanctioned by the courts of this country, I must hold that it is not competent for a judicial tribunal to enlarge the boundaries of a grant beyond the actual survey and location upon which it was made. It is even more certain that the principle cannot be sustained where, as in this case, the description of the land contained in the grant and papers annexed to it, is too indefinite and uncertain to give it force and effect, without the survey and location upon which it is based. It is too well settled, I think, to be controverted that, according to the laws, usages, and customs of the Spanish government, nothing short of an effective grant from the governor could confer a complete title, either to a front or back concession. It is undoubtedly true that an incomplete right might be acquired under an order or warrant of survey. Back concessions, it seems, were seldom made; and in no instance of which there appears to be any authentic account, except to the proprietors of the front; and, where made, uniformly had a depth of forty arpents, reckoning from the rear line of the first concession. But the same forms of title appear to have been required in the one case as in the other; and in no case could a fee simple estate be acquired from the government, without the severance of a definite tract from the mass of the public lands, under the operation of a complete grant. Under these circumstances, I find myself obliged to decide, upon the facts before me, that the complete title stops with the limits of the survey and location. The examination which I have made of the question has produced full conviction on my mind that there is no principle of law, that has been recognized and approved, to justify the extension of the complete fee-simple title beyond those limits; and I can conceive of none which it would be safe to apply to the titles of real estate to expand them. Any other rule of interpretation of the legal rights of these parties, in this respect, would be controverted in every stage of the proceedings under which they claim. It would be impeached

even by the prayer of the petition of Conway, in which he asks to be put in possession of the front and depth, setting the boundaries. It would be in direct conflict with the order of Unzaga, addressed to the surveyor, in which he directs that the surveyor shall set and mark the boundaries. It would repudiate the whole survey upon which the front as well as depth, in a great measure, reposes under the grant; and it would be wholly unsupported by the final decree or grant, which merely approves the previous operations, and grants the land accordingly.

In order to test the correctness of the conclusion, it may be proper to examine with more care the grounds upon which it rests, and to consider the objections that may be urged against it, and to compare both with some considerations not appearing upon the face of the papers.

It is too well known, I think, to be disputed, that the regulations of O'Reilly were in full force at the date of this grant, and the survey of Andry. By the twelfth article of those regulations it is declared, that "all grants shall be made in the name of the king, by the governor general of the province, who will, at the same time, appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the *procés verbal* which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government and cabildo, another shall be delivered to the governor general, and the third to the proprietor, to be annexed to the titles of his grant."—(1 Clarke's Land Laws, p. 979.)

It has never been questioned, I believe, that these regulations, during the period they were in force, were of binding obligation upon subordinate officers; nor is there any pretense that Unzaga relaxed their operation in this case, or dispensed with their requirements. On the contrary, it is shown by his decree, that they were substantially reaffirmed and reënacted, in his order directing the surveyor to set and mark the boundaries. But suppose it were otherwise, they constitute the best known guide to the usages and customs of the province in regard to surveys. In this respect all will agree, I presume, that they should have considerable influence upon the question, as constituting the most authoritative exposition of the law-making power of the province upon the general subject of surveys. They furnish, also, the best known criterion by which to judge what kind of a survey was required, when the terms of the grant were indefinite, to work a severance of the tract from the domains of the crown, and to convert it, under the operation of the grant, into private property.

It cannot be admitted, at this day, that any other lands pass by a conveyance or grant, than such as can be identified and defined by some of the modes authorized by law for ascertaining such facts. The Spanish regulation, it seems, required the bounds to be fixed in front and depth, in presence of the judge ordinary and two adjoining settlers. All the requirements of the article, so far as they are applicable to the duties of a surveyor, were obeyed and followed in this case.

This appears by the official certificate annexed to the title of Conway. A slight examination of the order of survey issued upon the petition, and of the certificate of survey, will be sufficient to demonstrate that the twelfth article of these regulations constituted the guide at least in these proceedings. The order or decree heretofore given in its exact language bears date at New Orleans, 27th September, 1776. The proper officer is directed, in substance, to go to the land, and put the petitioner in possession of that which may be vacant in the rear of his plantation, provided it is not claimed by others, and the possession so to be given do not injure the adjoining occupants, "*to the effect of which,*" according to the translation of the claimants, "*he shall set and mark the boundaries;*" or, according to the version, (1 Clarke's Land Laws, p. 955,) "*to which effect he shall establish his boundaries and limits.*" The disagreement is only in the form of expression, and cannot affect the merits of the question, both versions requiring the surveyor to mark or establish the boundaries of the tract to be surveyed. The regulations show what was intended by the order requiring the setting and marking of the boundaries; it was, in the emphatic words of the twelfth article, to fix the boundaries thereof in front and in depth.

Assuming that the tract does not extend beyond the forty-two arpents in depth, then Andry obeyed the directions of the authority under which he acted, performing his duty according to law, and his return is fully sustained. One class of the decided cases, cited by the counsel, lays down a principle of much importance on this point. It is, that an act done in pursuance of a public authority is presumed to be correct, or that "he who alleges that an officer intrusted with an important duty has violated his instructions, must show it." Upon no just principle can those claiming under Conway be permitted to deny either the accuracy or the completeness of the certificate of Andry, as it is a necessary part of the title papers to uphold their rights, and bears upon its face the signature of Conway, placed there by himself, in pursuance of the regulations aforesaid. It is essential to the validity of the grant itself; and without it, in my judgment, these parties would take nothing by their claim. The manner of the survey, and the extent of the operations in the field, are stated in the official certificate with great particularity, showing a strict and full compliance with the rules of survey prescribed in the regulations of O'Reilly. It is only necessary to advert to the action of the surveyor when he closed the survey on the side lines. The last monument planted by him on the upper line was at the distance of forty-two arpents from the river. Did this close the survey on that line? The certificate so declares at the commencement of the next sentence: "This line being thus drawn, I went to the lower one, common with Michel Chiasson," is the language in the translation of the claimants; and in Clarke's Land Laws it is still stronger: "This line being concluded, I went to the lower one." The inquiry as to which of the translations is most literal, becomes immaterial, as each is alike conclusive, that this line was finished and terminated at the last monument described, which was at the distance of forty-two arpents from the river. The manner narrated in which the lower line was surveyed is not very dissimilar, and is given with equal care. It concludes, according to the translation of

the claimants, "in order that the direction may not deviate," after describing the last monument set in the field, which was at the distance of forty-two arpents from the river, making the depth correspond exactly with the other side line. Both lines are ended at points clearly ascertained and marked by monuments on the land. Some reliance is placed upon the closing words of the sentence in which Andry describes his last act, in the survey on the lower line. No such remark was made when he closed the upper line. These words are rendered in the copy of the certificate appearing in Clarke's Land Laws, as follows: "In order to keep the course;" and are evidently descriptive of an intent which had been performed. They refer to an act done; to one that was complete, and not to one that remained to be performed. The order under which he acted authorized him to fix and mark the front and depth of the tract surveyed, and there his authority ceased. These acts were performed according to law, in the presence of the judge ordinary, and of the two adjoining neighbors, to whom, as well as to Conway, it was important to preserve the evidence of the course which he had run from the river, to the depth of the tract surveyed and located. The monument of which he was speaking had been planted to keep the course, as had been all the others previously described. It was not necessary to certify the purpose for which they had been planted at the close of each description of the cypress or mulberry stake, used to designate the intent; that was left for the close, and the words apply as fully to the first monument on the bank of the river, as to the one which marked the depth of the last line surveyed. He was speaking of an intent which had ripened into an act. It is no more or less than if he had said, I have planted all these monuments to keep the course and mark the boundaries of the land. This is evident by the concluding portion of the certificate, which immediately follows in these words: "And in order that all the above may appear, I give the following certificate." This certificate is signed by Andry, Judice, and Conway, and alleges the reasons why the adjoining neighbors did not affix their signatures, which was, that they did not "know how to sign."

The figurative plan or sketch of the operations delivered to the grantee was not laid before the commissioners who passed upon this claim under the act of 1805, nor is it among the papers submitted to me.

It is thus demonstrated, as it seems to me, that the survey was made in conformity with the twelfth article of O'Reilly's regulations; and that it terminated on each side line at the distance of forty-two arpents from the river, the bounds having been fixed, both in front and depth, in pursuance of the prayer of the petition, and in obedience to the order of Unzaga.

The binding character of the treaty stipulations, in regard to the rights of private property, is too apparent, and has been too frequently recognized by every department of this government, to render it necessary to remark upon any of the views which have been presented to enforce and illustrate that obligation. There cannot be any difference of opinion between the counsel and myself on this point, after we shall have ascertained the nature and character of the rights acquired under

the former government, which are entitled to that protection and guarantee.

In further examining the question for that purpose, it now becomes proper to consider the principal evidence of title upon which these parties rely, which is the grant issued by Galvez, on the 21st June, 1777. The argument for the claimants proceeds upon the ground, that the extent of the lands granted must be ascertained and measured by the descriptive words and sentences that precede the granting clause, aided by similar expressions to be found in the petition of Conway, and the preliminary proceedings, overlooking the fact, as it seems to me, that no one of the sweeping expressions to which they refer, gives either courses, distances, or monuments, or affords any other definite and certain rule by which to mark the limits and boundaries of the tract upon the land. The strength of the argument consists in the reliance which is placed upon the words, "all the vacant lands in the rear of the first forty arpents." These, it is insisted, in the connection in which the are employed, are broad enough to embrace their whole claim, and cannot be interpreted to include less, without distorting their true meaning, or departing from their usual and ordinary signification. There might be some force in the reasoning, if the words selected were as comprehensive as is supposed; and if, in their application to the subject-matter in dispute, they were certain to a common intent, or more especially if there were not other words in the same instrument evidently introduced to negative the expansive construction for which they contend, by limiting and qualifying their meaning, and thus giving force and effect to the grant. Let us examine the terms of the grant, solely with reference to its limitations, and see whether it be not so guarded, notwithstanding the peculiar structure and form of the instrument, as to defy every attempt to misunderstand its true meaning and effect. It is manifest that it is based upon the *procés-verbal* or official certificate of survey. The correctness of this conclusion is demonstrated by the following considerations:

1. The maker certifies that he had seen the proceedings of Andry, which could only refer to the return of his doings in the survey and location.

2. He declares them to be conformable to the rules made, touching the surveying of lands and adjoining neighbors.

The form of the expression, in referring to the rules of surveying, clearly indicates that they were made previous to his coming into office, and, unquestionably, has reference to the aforesaid regulations of O'Reilly, which he found in full force when he assumed the duties of first magistrate of the province.

3. Certifying the consent of the adjoining owners, from the allegations of the certificate, of which he could have no personal knowledge, he approves of the operations.

4. The granting words are not followed by any description of the premises. The grantor evidently referred to the general designation of the tract which preceded the granting clause, and relied upon the following limitation to qualify and render explicit the whole purpose of the grant.

5. Then comes the limitation which defines and exemplifies the

meaning and effect of the whole instrument. "In order that, as his own property, he may dispose or enjoy the same conformably to the said operations."

6. The grant refers to "*the foregoing decree of my predecessor*," under whose administration the proceedings had been commenced and perfected to the completion of the survey and location; and there is not a word in it affording the slightest pretense that Galvez intended to do any more than to confirm those proceedings, and give them force and effect according to the survey; and with that manifest intent he granted the lands, limiting the grant to the previous operations.

But suppose it were otherwise, and the rights of these parties to the back lands reposed entirely upon the general descriptive expressions to be found in the grant or order of survey and petition, then I think the grant, upon principle and authority, so far as it relates to these lands, would be void for uncertainty. It would be impossible by any means which they afford, unaided by the survey and location, to identify the land, which the title papers purport to sever from the public domain. It is necessary, in order to effect a severance, not only that the words should be sufficient to convey title, but in the absence of any positive location, that the description should be such that those claiming under the grant can identify the land. To meet the pressure of the case in this respect, the parties in interest expand their claim to the boundaries of the province, giving up all the intermediate points of limitation.

It is a great mistake, however, to suppose that the language even of the petition, when taken in its broadest sense, will bear an interpretation to sustain any such widely-extended limits. Like all other instruments, whose meaning is obscure, it must be considered as a whole in order to ascertain the intention of the maker. It clearly was not the intention or expectation of Conway that its descriptive words should mark the limits of the grant; any such hypothesis is contradicted by the prayer of the petition, in which he asks that he may be put in possession of the front and depth, "setting the boundaries." The description set out in the petition was only intended as a general designation of the place where the land was situate, which was to be surveyed, located, and bounded, under the regulations of law. The vague and indefinite description given was doubtless sufficient to enable the governor to determine whether it was expedient to issue the order of survey. It was for that purpose alone that it became necessary to employ any descriptive words in the petition; and in some instances it will be found that no description was given. If the petition had prescribed the boundaries, then, in a practical point of view, the survey was unnecessary; it became a mere form to meet the requirement of law. The order of survey, and the operations under it, completely negative any such assumption. The boundaries even of the front concession were not known, and could not have been given till after the survey; and it was doubtless a leading object of the proceedings to ascertain and define the extent of the front. Moreover, there is no language in the petition, when considered in its proper connection, that will sustain the views of the claimants, or bear out the interpretation for which they contend. The words "all the depth which may be vacant" evidently refer back to the previous recitals. That these recitals fall far short of

the boundary claimed, is most manifest. There is not an expression in the paper, when read in its proper connection, that makes any considerable approximation to such a theory. The petition represents that the front was destitute of fences, and it being cleared out upwards of a league in depth, and the cypress being at the distance of about a league and a half, the petitioner had no right to that growth. There is some want of clearness in regard to the nature of the right of which he was speaking; it is highly probable, however, that he referred to the permissive right, enjoyed by front proprietors, to take timber from the back lands for fences, and other needful purposes, on a plantation. This may be inferred from what follows, when he says he had "no right thereto, in consequence of your not having granted to him but the common depth of forty arpents, which is so short that he *cannot reach* the cypress trees." Omitting what is of no importance, then follow the words so much relied on to expand the grant to the full limits of the claim: "Therefore your petitioner prays you will grant him all the depth which may be vacant immediately after the said forty arpents." It seems to me, if we give the petition its utmost scope, it only asks for the vacant land to reach the cypress trees, leaving it to be inferred from the representation that the trees were about a league and a half distant from the front. It is difficult to appreciate the reasoning which seeks to expand this distance to nineteen miles on one of the lines, and to fourteen on the other.

That the practice of cutting timber upon the back lands for the purposes aforesaid was permitted by the Spanish authorities, is no longer a subject of dispute, though it has been substantially settled that it gave the parties no rights in the soil, which would seem to be self-evident. Even if the representation in regard to the distance of the cypress trees from the front could be relied on, the reference to them is too vague and general to afford any safe criterion, upon which to rely in the decision of the main question involved in the case; and the positions assumed by the claimants, and the course of the argument on their part, seem to admit the correctness of the conclusion. The cypress trees are not referred to in the petition as a boundary, nor are they relied on as such; and yet they are spoken of as standing in the rear of the vacant depth to which the descriptive recitals relate. The recital which represents that the front had been cleared out upwards of a league needs confirmation, and cannot well be reconciled with the operations in the field, if it be admitted that the cypress constituted the principal growth, which does not appear to be denied. The surveyor found it necessary to cut a road through the woods, in order to run the course one half that distance, rendering it apparent that the petition had been prepared without any precise knowledge of distances, or of the actual state of things on the land. No one probably would contend that the petition alone could furnish any satisfactory means by which to delineate any well-defined tract with legal certainty and precision; and yet, when the whole proceedings are carefully examined, it will be found that there is nothing in the title papers to sustain the views of the claimants, except what appears in that memorial. There can be no doubt that Unzaga, in issuing the order to the surveyor, had reference to the recital of the petition, knowing, as undoubtedly he

did, that the public interest would be protected by the direction which he gave to set and mark the boundaries; and that the ultimate rights to be acquired by the petitioner would depend upon the approval of the survey, and the final decree or grant.

The next step in the order of the proceedings was the survey and location, which are admitted to have terminated at forty-two arpents in the depth. The general phraseology in regard to the place where the survey had been made, was incorporated into the preamble of the final decree, as descriptive of the proceedings upon which it was based; but the force and effect of the decree, or grant, was carefully restricted to the operations of Andry in the field, as they appeared in his official certificate of survey. It is clear, therefore, not only that the parties themselves did not regard the descriptive words in the petition as prescribing the boundaries of the grant, but it is equally so that the description itself is too vague and uncertain to afford the necessary means of fixing a definite and certain location upon the land, and furnishes no reason whatever to support the present views of the claimants. If we depart from the survey and location, there does not appear to be any solid legal ground upon which to stand. Shall we stop when one of the side lines reach an elder grant? Shall they be continued to the cypress trees; and if so, where is that point? Shall they be prolonged into that growth; and if so, how far? Shall we stop at the first, second, or third considerable water-course? or shall the tract embrace all the residue of the domains of the crown within the claimed lines? The counsel contend that there is no legal resting place, until we reach the Amite and the lake. They are understood to insist that all the intermediate suggestions, as to the depth of the legal title, between the front tract and the rear boundary of the claim, rest in extreme uncertainty; and in that I agree. And as for the boundary claimed, I find nothing to support it, either in the title papers, or in any reference which has been made to the laws, usages, and customs of the Spanish government.

Separate the grant from the survey and location upon which it is founded, and it is clear to my mind that it would fall within the principle laid down by the Supreme Court in the case of the United States *vs.* King *et. al.*, (3 How., 786.) In that case a certificate of survey was produced, but on the evidence reported to the court, it was decided to be antedated and fraudulent. After having disposed of that point, Chief Justice Taney, in speaking for the court, says:

"Regarding the case in this point of view, the right of the defendant in error must stand altogether upon the instrument executed in 1795 and in 1797 by the Baron de Carondelet; and it has not the aid of any authentic survey to ascertain and fix the limits of the land, and to determine its location. The instruments themselves contain no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain; and it has been settled by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was vague and indefinite, as in the case before us, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land which could be maintained in a court

of justice. It was so held in the cases reported in 15 Peters, 184, 215, 275, 319; and in 16 Peters, 159, 160. After such repeated decisions upon the subject, all affirming the same doctrine, the question cannot be considered as an open one in this court. Putting aside, therefore, and rejecting the certificate of Trudeau, for the reasons before stated, the instruments in question, even if they could be construed as grants, conveyed no title to the Marquis de Maison Rouge for the land in question, and, consequently, the defendants in error can derive none from him. The land claimed was not severed from the public domain by the Spanish authorities, and set apart as private property, and, consequently, it passed to the United States by the treaty which ceded to them all the public and unappropriated lands."

It is not proposed to refer to other decisions, asserting the same principle, to sustain the authority of this case, believing that it is sufficient that the highest court in the United States has declared that the proposition is no longer open to dispute. If the principle of that decision be admitted, the conclusion is irresistible, that the parties, in order to sustain the legal title, must fall back upon the survey and location, or abandon the issue, unless their rights can be upheld to the full extent of the claim upon the descriptive words. That the descriptive words, in the connection in which they stand, are not sufficiently comprehensive to effect that object, seems to be manifest; and if they were, that they are too vague and indefinite to afford any safe reliance I entertain no doubt, whether they be tested by the rules of the common law, or by any other rules which have been recognized and approved by the courts of the United States. These several premises bring me again to the question, can the survey and location, thus clearly ascertained and established, be expanded beyond its own limits, while it remains uncontradicted by a single fact or circumstance in the case? I think not. No case has been produced to sustain any such principle, and I think none can be.

There is nothing disclosed in the ancient conveyances calculated, in the least degree, to relieve these parties from the present position of the case. The one most relied on is that of the judicial sale, which, when traced to its final consummation, results in terms more vague and indefinite, if possible, than the original grant itself, when considered without the survey and location. The description of a tract of land, giving "the depth which could be found," is so manifestly void as not to deserve a moment's consideration. The argument, therefore, as to the recognition of the extent of the claim, rests for its foundation upon the declaration in the will of St. Maxent, and the proceedings on the *ex parte* petition of Marigny, and the newspaper advertisement. These, I think, are greatly overbalanced by the terms of the final act of sale, which is the legal test to apply to the proceedings.

Of all the conveyances laid before the commissioners, one only mentions the Amite as the rear boundary of the claim, and that was the deed of William Conway to Daniel Clarke, executed on the 11th June, 1805, more than two years after the treaty of cession. The two conveyances of Maurice Conway, the original grantee, to Patrick Conway, in 1785, and to William Conway, in 1786, describe the depth "according to the title," without furnishing any additional guide to measure

its extent. The other titles are equally indefinite and uncertain in the language employed in the description of the depth, giving it "as the depth which can be found," or "as the depth according to the title," Even Marrener, who, according to the certificate of Lafon, surveyed a part of the land, and who acquired a portion of it a short time before the claim was presented to the board, under the deed of Maurice Conway to Patrick Conway, as appears by his conveyance to Daniel Clarke, in 1805, describes the tract conveyed, "with the depth according to the title of concession delivered by the late government to the late Maurice Conway." The other three title papers mentioned in the statement—Maurice Conway to Oliver Pollock, and the mortgages by William Conway to Pollock and Joyce, were not produced before the commissioners, and do not appear to have been relied on at that time to make out the title. These are the only conveyances in the case, that I have found, which contain the description, "with the depth as far as the lake." Taken as a whole, I must conclude that any presumption to be drawn from this source is greatly against the views of the claimants.

It is further contended that the claim was fully recognized by the act of Governor Claiborne, in issuing the order upon the petition of Donaldson and others, in pursuance of an authority conferred upon him, as it is alleged, under the second section of the aforesaid act of Congress, approved October 31, 1803, and that it was confirmed to its full extent by the board of commissioners who passed upon the evidences of title under the act of 1805.

The first proposition evidently fails upon the proofs exhibited, even if we admit the authority under which it is assumed that the proceedings referred to were instituted and perfected. It has already appeared in the statement of the case that no survey was actually made by Lafon in pursuance of that order, and it follows, as a necessary consequence, that none could be certified to affect the public interest, or to enlarge the rights of the claimants. The petitioners do not ask, in their petition, for any expansion of the rights which they had previously acquired under the government of Spain; and by no just mode of reasoning can it be maintained that Governor Claiborne intended to assume jurisdiction over any such question. But, unfortunately for the argument, even if the proceedings had been such as is supposed, the authority upon which they repose cannot be sustained. Whatever authority Governor Claiborne possessed, by virtue of his commission, was derived from the Constitution and laws of the United States, to which alone we can look as the source to uphold his acts. Congress has the exclusive power, under the Constitution, to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. The act under which he was appointed vested no authority in him over the public domain acquired by the treaty of cession. He could neither make a grant, or define the limits of one previously made, or perform any act to confer any right to the soil, not already complete and vested. In a word, he possessed no power to dispose of any portion of the public lands thus acquired, or to make any rule or regulation respecting the same. The act of Congress under which he was appointed merely provides that "all the military, civil, and judicial powers exercised by the officers

of the old government shall be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion." These powers were temporary, and were to be exercised in such manner as the President should direct; and the directions of Mr. Jefferson are to be found in the commission which he issued to Mr. Claiborne on the same day the act was passed. He gave him all the powers and authority which had been exercised by the former governors and intendants, with the following proviso, which, it seems to me, presents a full answer to the first proposition: *Provided*, That he should have no power or authority "to grant or confirm to any person or persons whatsoever any title or claims to land within the same."

It is clear, therefore, that Governor Claiborne could do no act, or authorize any to be done, which can be regarded as a recognition of the claim by the United States, in regard to its validity or extent. It thus appears, not only that no power was conferred to recognize any such claims, but that the exercise of any such authority was expressly forbidden. Whatever was done to recognize the claim under Governor Claiborne is utterly void, and of no effect. It was due to the claimants to answer the proposition as made; but, in so doing, it is by no means intended to admit that the acts of Governor Claiborne are obnoxious to the charge which the answer to the proposition may seem to imply. It does not appear, from the proofs, that he claimed the power or attempted its exercise. In the order issued by him, which constitutes the only act upon the subject that he performed, he merely says: "The proprietors of land adjoining the tract within mentioned *are requested* to show their respective boundaries, and the commandant of the district, if necessary, will extend the surveyor his protection." He gave no directions in regard to the survey, nor did he approve the certificates or plats after they were made by Lafon. There is certainly no recognition of the claim in that order, nor anything inconsistent with the power conferred to protect the inhabitants in the enjoyment of their property. Moreover, the wise policy adopted by Mr. Jefferson, in withholding all power from Governor Claiborne to grant lands or confirm titles, was subsequently approved and substantially enacted by Congress in the act passed 26th March, 1804. It is entitled "An act erecting Louisiana into two Territories, and providing for the temporary government thereof." (1 Land Laws, 112.) The act did not take effect till the first day of October, 1804, and by one of its provisions the act of 1803 was continued to that time. The plats and certificates of survey on the claim of Donaldson and Scott, and the claim of Clarke, were executed subsequent to the passage of that law. In those certificates Lafon alleges himself as acting under an authority derived from Governor Claiborne. Before the execution of those certificates all such interference with the public domain had been expressly interdicted by Congress, as appears by the *fourth* section of the act of 1804, which provides "that the governor and legislative council shall have no power over the primary disposal of the soil, nor to tax the lands of the United States, nor to interfere with claims to lands within the said Territory." And the *fourteenth* section

imposed penalties on any citizen of the United States, or other person, who should survey, or attempt to survey, or to designate boundaries to any portion of those lands belonging to the United States. The certificates of Lafon are dated subsequent to the time when this law took effect, and were clearly made in violation of its provisions.

The certificate of Lafon in the case of the Conway tract is equally discredited, and alike unauthorized and insufficient for the purpose for which it is introduced. In that case he describes himself as a deputy surveyor, under the surveyor general of the United States south of Tennessee. The powers vested by law in the surveyor general south of Tennessee were extended over the *public lands* to which the Indian title had been, or should be, extinguished, within the Territory of Orleans, by the act of 2d March, 1805, (1 Land Laws, 127,) as appears by its *seventh* section. This power, however, by express words, related to the *public lands, and not* to private surveys.

The act authorizing private surveys to be made by the surveyor general in such cases as the commissioners should think necessary, was not passed till the 28th February, 1806, eight days after the date of Lafon's certificate in that case. It is manifest that the doings of Lafon can derive no aid from that law, for the obvious reason that the certificate bears date prior to its passage.

It becomes important to inquire whether, in any view of the case, these plats can be considered as constituting a compliance with the act of 1805. By the *fourth* section of that act, it is declared that any person claiming lands under any legal French or Spanish grant *might*, and any person claiming under any incomplete title *should*, deliver a notice to the register of the land office, or recorder of land titles within whose district the land may be, stating the nature and extent of his claim, together with a plat of the tract or tracts claimed, and should also deliver every grant, order of survey, deed, conveyance, or other written evidence of his claim, for the purpose of having it recorded. "*Provided, however*, that where lands are claimed by virtue of a complete French or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded, except the original grant or patent, together with the warrant or order of survey, *and the plat;* but all the other conveyances or deeds shall be deposited with the register or recorder, to be by them laid before the commissioners when they shall take the claims into consideration."

The plats of the surveys, which by the act of 1805 were directed to be laid before the commissioners, were the original plats executed under the French or Spanish authorities, as is clear from the language of the act. But if there were any doubt on this point, it would be removed by a reference to the third section of the act of 1806, (1 Land Laws, 132,) which repeals so much of the act of 1805 "as makes it the duty of every claimant to lands within the territory of Louisiana to deliver to the recorder of land titles a plat of the tract or tracts, * * so far as relates to claimants whose tracts had not been surveyed by the proper officer under the Spanish government, prior to the 20th December, 1803." The language of the act, and the construction thus placed upon it by Congress, render it obvious to my mind, that the certificates and plats of Lafon do not constitute a compliance with the

requirements of the act of 1805, even if they had been executed in pursuance of a lawful authority, and had been based upon actual operations in the field. The act of 1805 relates in express terms, certainly by necessary implication, to the French or Spanish surveys. These plats did not emanate from either of those sources, as is manifest from their dates; but were such as had been executed by Lafon, under the circumstances before named, after the United States had acquired jurisdiction over the territory, and therefore do not fall within the letter or the intent of that act.

That this claim has not been recognized by the executive department since the period of which I have been speaking, till the patents were issued, is so apparent as to render comment, to enforce the conclusion, in a great degree, unnecessary. It had been steadily resisted by the General Land Office from the first moment when it was presented to Mr. Graham, in 1829, and never received the sanction of the head of that bureau. The opinion given in favor of the claim by one of the solicitors stands alone, and was never approved by the head of the department. Until the events had taken place which gave rise to this investigation, no Secretary of the Treasury had deemed it within the scope of his authority to confirm the claim, or to decide upon its limits. It had been twice referred to my predecessors, neither of whom found it necessary to give an official opinion upon the main questions in dispute. They were evidently under advisement before Mr. Legaré, and from the inquiries propounded by him to Mr. Blake, we learn what some of the points were which he had under consideration.

In view of all the circumstances exhibited in the statement of the case on this point, prior to the issuing of the patents, I am of opinion that they furnish no ground whatever on which to declare or to presume a recognition of the claim by the United States.

But had the commissioners authority, under the act of the 2d March, 1805, to enlarge the rights of the parties acquired under the former government, or to recognize and confirm the grant to the extent claimed? I think not. The act under which these adjudications were made was entitled, "An act for ascertaining and adjusting the titles and claims to lands within the territory of Orleans and the district of Lousiana." (1 Land Laws, 122.) The *first* and *second* sections provide that the titles of parties in possession under any duly registered warrant or order of survey, or by permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish government, shall be confirmed. The *third* section creates two land districts in the territory of Orleans, and makes provision for the appointment of a register in each, and also for the appointment of a recorder of land titles in the district of Louisiana. The *fourth* section is the one above cited, to which I again refer. It makes provision for two classes of claims:

1. Grants and incomplete titles bearing date subsequent to the 1st day of October, 1800, and the claims provided for in first two sections.

2. Complete grants, claimed by virtue of any legal French or Spanish grant, made and completed before the 1st October, 1800.

It only becomes necessary to consider so much of the section as relates to the rights of those claiming under the second proposition.

If they saw fit to exercise the right, they were permitted, at any time before the 1st day of March, 1806, to deliver to the register or recorder of land titles within whose district the land may lie, a notice in writing, stating the nature and extent of their claims, together with a plat or plats of the lands claimed. If they decided to exercise the right, they were required, on or before the day on which they delivered the notice and plat, also to deliver to the said register or recorder all the written evidence of their claim, and it is directed that it "shall be recorded." The act, however, declares in the proviso, before noticed, that it shall not be necessary for claimants to complete French or Spanish grants to have any other evidence of such claims recorded, except the original grant or patent, together with the warrant or order of survey and the plat. All the other conveyances or deeds were required to be deposited with the register or recorder, to be laid before the commissioners, "when they shall take the claim into consideration."

The fifth section provides for the appointment of two persons in each district who should, together with the register, "be commissioners for the purpose of ascertaining, within their respective districts, the rights of persons claiming under any French or Spanish grant as aforesaid, or under the two first sections of this act." It further enacts, that "each board, or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner all matters respecting such claims, * * * and to decide in a summary way, according to justice and equity, on all claims filed with the register or recorder, in conformity with the provisions of this act, and on all complete French or Spanish grants, the evidence of which, though not thus filed, may be found of record on the public records of such grants; which decisions shall be laid before Congress in the manner hereinafter directed, and be subject to their determination thereon." The same section further directs that two transcripts shall be prepared of the decisions in favor of claimants, one to be transmitted to the Surveyor General, and the other to the Secretary of the Treasury; and that a full report of the claims rejected should also be made to the Secretary of the Treasury, "which reports, together with the transcripts of the decisions of the commissioners in favor of the claimants, shall be laid by the Secretary of the Treasury before Congress at their next ensuing meeting."

No form of expression occurs to me, which, if adopted as a substitute, would add either strength or clearness to the language above cited from the fifth section of the act of 1805, by which Congress reserved to itself the ultimate power of deciding all matters respecting these claims, which had not been concluded by the treaty stipulation to respect private property. The decisions of the commissioners were to be laid before Congress for their determination thereon. There is no proposition clearer to my mind than the one which denies the authority of these commissioners under that law to decide this claim finally as against the United States.

It may be said, however, that the language of the petition indicates that it was the intention of Conway, when he presented it to Unzaga, to obtain a double concession, and that these parties have an equitable

claim upon Congress to the extent of eighty arpents in the depth, being thirty-eight more than are included in the perfect and complete grant. In certain views of the case there is some force in the suggestion, while in others it would seem to be unfounded. The strength of the suggestion consists in regarding that part of the claim as brought within the policy of previous laws of Congress passed upon the same subject. It presents a question exclusively within the jurisdiction of Congress, and can have no influence in determining any of the questions submitted to me. There would seem to be no reason to doubt that double concessions were granted by the Spanish authorities in some instances to the front proprietors. The first provision in any law of Congress, recognizing any such equitable claim, is to be found in the fifth section of the act of the 21st April, 1806. (1 Land Laws, 138.) It is entitled "An act supplementary to an act entitled 'an act for ascertaining and adjusting the titles and claims to lands within the Territory of Orleans, and the district of Louisiana.'" That provision made it the duty of the commissioners "to inquire into the nature and extent of the claims which arise from a right, or supposed right, to a double or additional concession on the back of grants or concessions heretofore made, * * * and to make a special report thereon to the Secretary of the Treasury, which report shall be by him laid before Congress at their next ensuing session."

That in the opinion of Congress, front proprietors might have some kind of a claim to a back concession, independent of the legal forms of title, is further illustrated by the *fifth* section of the act of the 3d March, 1811, (1 Land Laws, 189,) securing to them certain preëmption rights. It provided that every person who, by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim confirmed by the commissioners, owned a tract of land bordering on a river, and not exceeding forty arpents in depth, should be entitled to a preference in becoming the purchaser of the land, adjacent to and back of his own tract, not exceeding forty arpents in depth, nor in quantity that which is contained in his own tract, and three years were allowed for the making of the purchase.

The preëmption right thus secured was continued two years longer by the act of the 11th May, 1820, (1 Land Laws, 330,) and the provision was substantially reënacted by the act of the 15th June, 1832, entitled "An act to authorize the inhabitants of Louisiana to enter the back lands," limiting the time to make the application to three years, (1 Land Laws, 499.) The time thus allowed was further extended by the act of 24th February, 1835, one year from the 15th June, 1835.—(1 Land Laws, 536.)

The first law above named instituted an examination in regard to the nature and extent of the claim, and directed the report of the commissioners to be laid before Congress, which probably led to the subsequent legislation giving the proprietors preëmption rights. None of the legislation to which I have referred regarded these claims as legal rights in the soil which could be enforced in a judicial tribunal. It is very clear that no such supposed right or claim can have any influence in the determination of the extent of the legal title. The commissioners appointed under the act of 1811 gave their views in regard to double

concessions in the case of Benjamin Babin, cited in the opinion of the Supreme Court in Jourdon *vs.* Barret, (4 How., 181,) where they are stated as follows:

"The claimant has no other foundation for his title to the second depth, than having occupied the front and first depth, and having occasionally supplied himself with timber from this second depth. According to the laws, customs, and usages of the Spanish government, no front proprietor, by any act of his own, could acquire a right to lands further back than the ordinary depth of forty arpents; and although the Spanish government has invariably refused to grant the second depth to any other than the front proprietor, yet nothing short of a grant or warrant of survey from the governor could confer a title or right to the land; wherefore we reject the claim." The court concludes by saying, "we give this as an instance of many similar ones reported."

These are some of the considerations that might be urged before Congress in favor of the equitable claim of these parties to the residue of a back concession.

In further discussing the point, the court say, in that case, that the side lines of back concessions, when granted by the former government, as a general rule, were not permitted to diverge, but proceeded in a direct course from the front, so as to secure equal justice to the front proprietors, to whom alone, it seems, these grants were made.

On the contrary, it might be contended that the great extension of the front, which was effected by the last survey or location, over the previous Indian title, evidently including a large tract which had not been cleared, and the grasping character of the course on the side lines, fully accomplished all the purposes of the petitioner set out in the petition; giving him more than a double concession on the river, and a sufficient quantity of the rear land beyond his previous grant, to meet more conveniently all the objects mentioned in that memorial. It is highly probable that it was these considerations that induced the surveyor to regard it as incumbent on him to terminate the operations in the field at the points so explicitly described in his return. Having made these suggestions, I leave them for the consideration of those who have jurisdiction of the question to which they relate.

This brings me to the second inquiry directed by the joint resolution, which puts in issue the authority assumed by the President, in pursuance of the decision of the Secretary of the Treasury, in the granting of the patents. Two patents were issued, one on the claim of Donaldson and Scott, and the other on the claim of Clarke, and respectively bear date the 22d August, 1844.

To uphold the authority thus assumed, it is contended, in substance, that the claim had been previously confirmed by a law of Congress to its full extent, and that the law confirming it required patents to issue in such cases, and that the patents, being signed by the President and recorder of land titles, were issued in conformity to law. These views are enforced by various considerations, in which it is insisted that the decision of the President thus carried into effect is final and conclusive in the premises, and that the patents issued in pursuance of that determination are wholly removed from all impeachment.

The first three propositions depend entirely upon the fact whether the assumptions on which they repose can be sustained, and must be determined by the act of Congress to which they refer.

The two last cannot be admitted, unless the acts of the President and of the officers issuing the patents were performed in pursuance of an authority conferred upon them by law. The President, no more than the courts of law, can determine any matter finally, unless the power to do so is derived under the Constitution and laws of the United States.

The power over the public lands is vested by the Constitution exclusively in Congress, and the President has no authority over the subject, except what may be inferred from the general power to see that the laws are faithfully executed, unless it be conferred upon him by an act of Congress; nor can the power, when conferred, be exercised in any other form or in any other mode of proceeding than that which the law prescribes.

This view is too firmly established by the Constitution, as a primary principle in the distribution of its powers, to need any confirmation; and the proposition is too palpable to require any illustration to enforce it. Whether the claim had been confirmed by an act of Congress depends entirely upon the proper construction of the act of the 18th April, 1814, upon which the claimants rely on this point to establish their rights. (1 Land Laws, 247.) It is entitled "an act concerning certificates of confirmation of claims to lands in the State of Louisiana," and it is worthy of special remark, that there is not a word in the act which proposes to confirm any claim whatever.

By the first section it is enacted, "that in all cases where certificates of confirmation to lands, lying in either of the land districts established by law in the State of Louisiana, have been issued agreeably with the provisions of the act, entitled, An act respecting claims to lands in the Territories of Orleans and Louisiana, passed the 3d March, 1807, and which were directed to be filed with the proper register of the land office within twelve months after date, and on claims which are included in the transcript of decisions made in favor of claimants, and transmitted to the Secretary of the Treasury, the said certificates shall, in every case where the lands have not been already surveyed according to law, be, by the said registers, delivered to the principal deputy surveyor of the district, together with the proper descriptions of the tracts to be surveyed, wherein the quantity, locality, and connection, when practicable, with each other, shall be stated, at any time after the expiration of three months from the passage of this act, unless the claimant shall otherwise specially direct." It was also made the duty of the said deputy surveyor south of Tennessee, to survey the land accurately, according to the said certificates of confirmation and description, and make general and particular plats thereof, which he should return to the office of the register, together with the original certificates.

This law, it appears to me, is clear and distinct, and is susceptible of but one interpretation, consistent with its language. It directs, in cases where certificates of confirmation have been issued agreeably with the provisions of the act of 1807, and on claims included in the

transcript of decisions in favor of claimants transmitted to the Secretary of the Treasury, that the register should deliver the same, with a proper description of the tract to be surveyed, to the surveyor, who should survey the tract according to the said certificate and description, and return plats, together with the original certificates, to the register. And by the second section it is provided, that the register should thereupon issue a patent certificate to the claimant, and transmit the same to the Commissioner of the General Land Office; and if it should appear to him that the certificates had been fairly obtained, and that they corresponded with the transcript transmitted to the Secretary of the Treasury and the plats returned by the surveyor, patents were to be granted. The very first requisite to obtain a patent was, that the certificate of confirmation should have been issued agreeably to the act of 1807, and be in the transcript of favorable decisions previously transmitted to the Secretary of the Treasury. It is by virtue of this provision that it is contended that this claim has been confirmed to its full extent. The construction cannot be sustained. No part of the act proposes to confirm any claim, but merely authorizes, under certain prescribed rules, the issuing of patents in a class of cases specially designated, and for lands which had been previously confirmed under the law of 1807.

This is determined by the words of the act upon which these parties rely, as well as those standing in the same connection, and is rendered still more apparent by that part of the second section which authorized the Commissioner of the General Land Office to determine whether the certificate required from the register, when produced, had been fairly obtained, and whether it corresponded with the transcript transmitted to the Secretary of the Treasury.

The benefits of the act were extended to all cases where certificates of confirmation to land had been issued agreeably to the provisions of the law of 1807. These are the only words of any importance by which to ascertain the first requisite, descriptive of the class of claims previously confirmed, to which the act applied. Let us now transpose the sentence, with a view to collect its meaning, and ascertain the second requisite prescribed by the act when thus transposed. It would read, "in all cases where certificates of confirmation to land have been issued agreeably to the law of 1807, and on claims included in the transcript of decisions made in favor of claimants." This mode of reading the sentence is perfectly consistent with its grammatical construction, and presents the proper connection of the principal words more distinctly to the mind.

It thus appears that the second requisite was, that the claims on which the certificates had issued, should appear in the transcript of favorable decisions which had been transmitted to the Secretary of the Treasury. Then follows the third requisite, which was, that the certificates should be such as the previous law had directed to be filed with the proper register of the land office within the time specified.

The sentence, as transposed, leaving out the words of no importance, and supplying the ellipsis, would read as follows: "In all cases where certificates of confirmation have been issued agreeably with the provisions of the act of 1807, and have been issued on claims which are in-

cluded in the transcript of decisions in favor of the claimants transmitted to the Secretary of the Treasury, and which certificates were directed to be filed with the proper register of the land office within twelve months after date."

The act was carefully limited to the certificates which had regularly issued agreeably to the law of 1807, and prescribed two important tests by which that fact should be ascertained. It was those certificates *only* which had been issued on claims included in the transcript of decisions made in favor of claimants, and which the law under whose provisions they had been issued by the commissioners directed to be filed with the proper register of the land office within twelve months after date. If the certificate produced was regularly issued, and was one which the previous law directed to be thus filed, and the claim on which it had been issued was embraced in the transcript of favorable decisions, then the law provides that the certificate shall entitle the party to the benefits of the act. The reference to the claim on which it had been issued, and to the direction of the previous law in regard to filing, are descriptive of the certificate mentioned in the preceding part of the sentence, and were evidently introduced as a limitation upon the powers of the officers on whom the execution of the act was devolved. They were intended to guard the public interest against the receipt of certificates not genuine, or irregularly issued without authority of law, and to confine the operation of the act to those which had been regularly issued under the law of 1807; and as the best mode of ascertaining whether they had been so issued, and of guarding against mistake or fraud in regard to the paper produced, it was directed that the claim upon which it was founded should also appear in the transcript of favorable decisions. Congress, in so doing, not only prescribed what should be regarded as a certificate of confirmation regularly issued by the commissioners, but also prescribed the rules by which the paper, when produced as such, should be tested. It must have been in conformity with the act of 1807, and the claim on which it purported to be founded must appear in the transcript of favorable decisions. These directions of law not only constituted a limitation upon the power of the officers charged with the execution of the act, but they became their guide in the performance of the duties assigned to them by its provisions. Whenever any such certificate was presented, and the party holding it demanded the benefits of the act, three questions were first to be settled:

1. Had the certificate been issued agreeably to the law of 1807?
2. Was the claim on which it was based included in said transcript?
3. Was the certificate one which the previous law directed to be filed as aforesaid?

Until these several points were settled in favor of the certificate, no proceedings could legally follow; and if either of them were settled adversely, the party would take nothing by his application. Suppose, for example, that the certificate produced had been regularly issued under the law of 1807, but the claim had been omitted in the transcript of favorable decisions, it is clear that there could have been no authority to grant a patent. On the other hand, suppose the claim to have appeared in the transcript, but no certificate had ever issued, the

same conclusion follows with absolute certainty. It was only where all the conditions were fulfilled that the authority to issue the patents could be exercised. These views will be confirmed by again referring to the *second* section of the act under consideration. It provides that the surveys, as soon as made, shall be returned to the office of the proper register, together with the original certificates of the commissioners. These certificates were such as had been issued by said commissioners under the *sixth* section of the act of 3d March, 1807, entitled "An act respecting claims to land in the Territories of Orleans and Louisiana," (1 Land Laws, 153,) by which they were directed to transmit to the Secretary of the Treasury and Surveyor General "transcripts of the final decision made in favor of the claimants" by virtue of that act. And they were also required to "deliver to the party a certificate, stating the circumstances of the case, and that he is entitled to a patent for the tract of land therein designated, which certificate shall be filed with the proper register, or recorder, within twelve months after date." The power to issue certificates of confirmation, conferred by that provision, was vested in the commissioners alone, and is expressly limited to claims included in the "transcripts of final decisions made in favor of claimants" by virtue of that act, employing the identical words subsequently incorporated into the act of 1814, and constituting the phrase in the last-named act upon which the claimants rely. The previous words of the *sixth* section of the act of 1807, in regard to the filing of the certificates, are also incorporated into the act of 1814, showing conclusively that the certificates of confirmation therein mentioned were the certificates which the commissioners had issued under the sixth section of the act of 1807, and that they were issued on the claims which the commissioners were directed to include in the transcripts of favorable decisions.

It only remains to ascertain what were the claims thus finally decided, which the commissioners by that provision were directed to include in the transcript of favorable decisions, and upon which they were authorized to issue the certificates of confirmation, to demonstrate the true meaning of the act of the 18th April, 1814.

This question is answered by the *fourth* section of the act of 1807, which gave the commissioners full powers to decide upon all claims to lands within their respective districts, where the claim was made by a person who was an inhabitant of Louisiana on the 20th December, 1803, "and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine or salt spring; which decision of the commissioners, when in favor of the claimants, shall be *final* against the United States, any act of Congress to the contrary notwithstanding." The final jurisdiction of the commissioners is thus carefully limited to a tract of land not exceeding a league square. Their decisions on *such* claims, and such only, were final as against the United States. It was their decisions on such claims which, by the sixth section, they were required to include in the transcript, and transmit to the Secretary of the Treasury and surveyor general; and it was only upon these decisions made in favor of claimants that they were authorized to issue, or ever did issue, certificates of confirmation.

And, by the *eighth* section of the same act, it is enacted that the com-

missioners should "report to the Secretary of the Treasury their opinions on all the claims to land within their respective districts, which they shall not have finally confirmed by the fourth section of this act. The claims shall, in the said report or reports, be arranged into three general classes, that is to say: *First.* Claims which, in the opinion of the commissioners, ought to be confirmed in conformity with the provisions of the several acts of Congress for ascertaining and adjusting the titles and claims to land within the Territories of Orleans and Louisiana. *Secondly.* Claims which, though not embraced by the provisions of the said acts, ought, nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the Spanish government. *Thirdly.* Claims which neither are embraced by the provisions of the said act, nor ought, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the Spanish government. And the said report and reports, being in other respects made in conformity with the forms prescribed according to law by the Secretary of the Treasury, shall by him be laid before Congress, *for their final determination thereon*, in the manner and at the time heretofore prescribed by law for that purpose."

In the last mentioned act we have so clear and distinct an exposition of the class of cases on which the act of the 18th April, 1814, was intended to operate, that it is difficult to perceive how any doubt can arise upon the subject. The commissioners were directed to issue certificates of confirmation to claimants, and to transmit transcripts of their decisions to the Secretary of the Treasury in cases of claims for tracts not exceeding the quantity of acres in a league square, and such decisions, when in favor of the claimants, were final. Nothing can be plainer or more certain than that the act of the 18th April, 1814, was applicable exclusively and solely to the cases in which the commissioners were authorized finally to decide in favor of claimants. The claim of these parties was not within this class; and they, or any of those under whom they claim, never received from the commissioners any certificate of confirmation, for the obvious reason that the commissioners had no power or authority to do or perform any such act in this or any similar case. The class of claims in which that of the claimants was embraced was to be reported to Congress for their final determination, in pursuance of the eighth section of the act of 1807. Congress accordingly did act on these claims, as appears by the act of the 14th April, 1814, and confirmed those founded on *incomplete* titles to the extent of a league square. The claims that had been brought before the board on complete and perfect titles were not confirmed, for the reason, unquestionably, that they required no confirmation from the government of the United States. Such lands had been severed from the domain of the crown of Spain before the treaty of cession, and had become private property, and were alike protected by the law of nations and by the terms of the treaty. These titles, therefore, must stand or fall upon their own merits.

The great error, in the opinion of the Secretary of the Treasury, of the 12th August, 1844, consists in supposing that while the act of the 14th April, 1814, confirmed incomplete titles, that the act of the 18th April, 1814, confirmed those which were perfect and complete.

It has already appeared that the latter act had reference to another and altogether distinct class of claims, and only directed patents to issue where the decision of the commissioners was made final by the act of 1807, and when they had issued certificates of confirmation under its sixth section. Another manifest error in the opinion consists in regarding the certified copies of the proceedings of the board, procured in 1841, as certificates of confirmation issued by the commissioners under the act of 1807. That these copies were so regarded is strongly corroborated by certain memoranda appearing on the outside of the copies, which are as follows: On the copy relating to the Donaldson and Scott claim is written, "certificate of commissioners, of confirmation, No. 133;" and on the other, relating to the Clarke claim, "confirmation to Daniel Clarke, No. 127." The other principal error consists in separating the two requisites as to the certificates of confirmation, that they should have been issued agreeably to the act of 1807, and be on claims in the transcript of favorable decisions, and in regarding them as applicable to distinct and different classes. The language of the act cannot be made to sustain such a construction, and its true meaning is demonstrated, as it seems to me, by reference to the act under which the certificates were directed to be issued and the transcripts made.

In conclusion, I am of opinion:

1. That the grant to Maurice Conway is a complete and perfect Spanish grant to the extent of forty-two arpents from the river, and no more. That the said grant does not convey any lands beyond that extent, but that the title to the same is vested in the United States.

2. That the patents which have been issued in the case of the Donaldson and Scott claim, and the Clark claim, were so issued without authority of law, and are therefore void and of no effect.

I have the honor to be, very respectfully, sir, your obedient servant,

NATHAN CLIFFORD.

The PRESIDENT OF THE UNITED STATES.

STATEMENT OF LOUIS JANNIN.

I. *Has Congress the constitutional power to repeal an act confirming a Spanish grant?*

II. *If Congress had that power, and thought proper to exercise it in the case of the Houmas claim, that claim should be immediately reconfirmed, as it is good and valid to the full extent of the land claimed, and Congress is by law the only competent tribunal.*

These questions arise upon the petition of certain settlers on the Houmas grant in Louisiana, and upon an adverse protest and petition of the owners of the grant.

The second is narrowed down by the uniform action of the government officials to the construction of a few words in the grant, describing its extent.

If the first question is decided in the negative, the decision of the second question becomes unnecessary. The first is probably the only real question in the case, and it will therefore be examined at length.

It is neither intended nor necessary to submit an original disquisition on this question. The attributes and limits of the constitutional powers of the general and State governments have been thoroughly investigated by the greatest judicial minds in the country. We simply propose to submit copious extracts from their decisions, classed under appropriate heads. But it is, in the first place, necessary to explain how these questions arise.

Statement of the case.

Soon after the purchase of Louisiana, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and district of Louisiana," which was approved on the 2d of March, 1805.—(1 Land Laws, 122.)

This act required the claimants to submit the evidence of their titles to a board of commissioners, appointed under the act. The commissioners were directed "*to decide, in a summary way, according to justice and equity, on all claims filed*, and *their decisions were to be laid before Congress, and to be subject to their determination thereon.*"

The land claim in Louisiana known by the name of the "Houmas" claim, from an Indian tribe which had originally owned and sold it, was then owned in three divided portions, by William Conway, Daniel Clarke, and Donaldson and Scott. All three filed their claims with the board of commissioners, which, on the 3d and 10th of March, 1806, confirmed them unanimously. These claims are designated by numbers 125, 127, and 133, in the report of the commissioners, which was submitted to Congress on the 9th of January, 1812, by the Secretary of the Treasury.—(State Papers, Pub. Lands, by D. Green, vol. 2, p. 287.)

The final determination of Congress remained suspended until the passage of the act of June 2, 1858, (11 Stat. at Large, 294,) by the second section of which all claims favorably reported on in the abovementioned report were confirmed, "saving and reserving, however, to all adverse claimants the right to assert the validity of their claims in a court or courts of justice."

The most valuable part of the Houmas claim fronts on the Mississippi river, and has been since 1774, and now is, in the actual possession of the owners of the claim, and cultivated by them exclusively. But the claim, as confirmed, extends in the rear to the Amite river and Lake Maurepas; and though the claimants always had the legal possession of it, and paid taxes on it, a number of persons have settled on the back land. At one time entries were permitted to be made on that part of the claim, in violation of the act of March 3, 1811, section 6, which reserves from sale all lands to which a claim had been regularly filed. But in 1844 they were all set aside on account of their interference with the Houmas claim, the purchase-money was ordered to be refunded, and in 121 cases it was actually refunded.

These settlers, not content with the provision in the confirmatory

act, which saves the rights of adverse claimants, now petition Congress either to reject the Houmas claim in toto, or to repeal the confirmatory act, and to leave the parties where they were before the passage of that act. It has also been suggested that Congress might pass a bill authorizing the Houmas claimants to sue the United States for the confirmation of their claim. But that also presupposes that the confirmatory act was first repealed.

The owners of the Houmas claim protest against the adoption of any of these propositions, and, indeed, against any action of Congress which can in the least affect that claim. That claim is now confirmed; that confirmation is a vested right, and beyond the reach of Congress. For this reason, they submit that the joint resolution of March 3, 1859, which suspends the action of the Executive upon their claim, should be repealed. It is a cloud upon their title, may mislead others, and seems to keep in suspense what has been finally settled, and cannot be unsettled by Congress.

Thus, we are brought to the consideration of the question, whether Congress has the constitutional power to repeal the act by which our claim was confirmed?

Under this head we shall show that—

1. A confirmation of a Spanish grant by act of Congress is equivalent to a legislative grant. It is a complete title, a legal title, and a vested right, with or without a patent.

2. As soon as the Houmas claim was confirmed, all power of the general government over it as property ceased, and vested in the State. Any interference of Congress thereafter would be an unconstitutional infringement of the rights of the State of Louisiana.

3. The government of the United States being one of limited powers, the right now claimed for Congress to repeal the confirmatory act does not exist, unless it is expressly warranted by the Constitution.

4. Any measure impairing a preëxisting right of property is a judicial and not a legislative act, and when it destroys vested rights, is contrary to the fundamental principles of government.

5. The power claimed for Congress is unconstitutional, because it would take our property "without due *process of law.*"

6. And because it would be taking *private property for public use, without just compensation.*

7. Application of these principles to the case of the confirmation of the Houmas claim, and equities of the case.

I. A confirmation of a Spanish grant by act of Congress is equivalent to a legislative grant. It is a complete title, a legal title, and a vested right, with or without a patent. To persons familiar with the adjudications of the Supreme Court of the United States on Spanish land titles, this is a self-evident proposition. To others it will be made clear by the following authorities:

In the case of Grignon's Lessee *vs.* Astor, 2 How., 319. Pierre Grignon had a land claim in Michigan confirmed by an act of February 21, 1823, (3 Stat. at Large, 724,) which provided that on all the claims confirmed by the act patents should issue. Pierre Grignon died in March, 1823. The land was sold on the petition of the administrator of the estate, under an order of court of 1826. The patent was issued

in 1829 to Pierre Grignon's heirs. The plaintiffs claimed the property under the heirs-at-law; the defendants under the administrator's sale. Upon this state of facts, the court say, (2 How., 344:) "It has been contended by the plaintiff's counsel that the sale in the present case is not valid, because Peter Grignon had not such an estate in the premises as could be sold under the order of the county court, it being only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act of Congress of February, 1823, which was equivalent to a patent. It was higher evidence of title, as it was the grant of the fee which had been in the United States by the government itself, whereas the patent was only the act of its ministerial officers."

Strother *vs.* Lucas, 12 Pet., 454. "That a grant may be made by law as well as a patent pursuant to a law, is undoubted, (6 Cr., 128,) and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo.*"

Patton's Lessee *vs.* Easton, 1 Wheat., 487. "The act of assembly vesting lands in the trustees of the town of Nashville is a grant of those lands."

In Sims *vs.* Irvine, 3 Dallas, 456, Chief Justice Ellsworth said: "By these means Sims acquired to the said island a complete, *equitable* title, and one which needed a patent of confirmation to render it a complete legal title. A confirmation of this equitable title, as effectual as that of any patent could have been, was afterwards comprised in the compact between Virginia and Pennsylvania, and in the ratification of the same by the legislative act of the latter."

In Chouteau *vs.* Eckhard, 2 How., 374, the Supreme Court, speaking of the reports of commissioners, says: "On these reports coming before Congress, it acted directly by statute on such titles as were by the legislature considered well-founded and just claims."

Les Bois and Bramell, 4 How., 463. "A confirmation of a French or Spanish claim, either by a board of commissioners under the act of 1807, or by Congress directly, or by the district court, by force of the act of 1824, is a location of land by a law of the United States."

Enfield *vs.* Permint, 8 New Hamp., 515. "A grant of land, by an act of the legislature, vests an actual seizin in the grantee."

"The grant in such a case is a public act, much better calculated to give notoriety to the conveyance than an actual entry upon the land by an agent of the State, or by the grantee. And this notoriety of the grant is, in contemplation of law, equivalent to an actual entry by the grantee."—(8 Cranch, 246, 248; 5 Coke, 94; 3 Green, 441. Hill *vs.* Dyer.)

Enfield *vs.* Day, 11, New Hamp., 528. "A mere grant of land by the government is ordinarily evidence of an actual seizin at the time of the government, and vests such seizin in the grantee."

Bissell *vs.* Penrose, 8 How., 331. "By the confirmation the title became complete."

To the same effect as the above is the case of Doe *vs.* Eslava, (9 How., 447,) in which they are all reviewed.

II. As soon as this grant was confirmed, all power of the general government over it as property ceased, and vested exclusively in the State. Any interference of Congress thereafter would be an unconstitutional infringement of the rights of the State of Louisiana. This is the doctrine of the leading case of Pollard's lessee *vs.* Hagan *et al.*, 3 How., 221. "The United States never held any municipal sovereignty, jurisdiction of right of soil in and to the territory of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana." Ibid., p. 222: "The manner in which the new States were to be admitted into the Union, according to the ordinance of 1787, as expressed therein, is as follows: 'And whenever any of the said States shall have sixty thousand free inhabitants therein, such States shall be admitted by its delegates into the Congress of the United States, *on an equal footing with the original States in every respect whatever.*'"

Ib., p. 224: "The object of all the parties to this contract of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands as property was to cease."

"Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new States will be complete, and they and the original States will be upon an equal footing in all respects whatever."

Thus in Louisiana the United States held and still hold the public lands in temporary trust for the State. In practice, all lands in Louisiana were at first considered as public lands, until they were shown to be private property under the acts passed for the adjudication of land claims. As soon as any of these claims were confirmed, and thereby declared to be private, and not public property, they fell exclusively under the municipal government of the State. The protection of the property of the inhabitants of Louisiana, stipulated for in the treaty of cession, terminated with the admission of Louisiana as a State of the Union, because then these inhabitants were upon an equal footing with their brethren in the other States, and enjoyed the protection of, and were amenable to, the State authorities alone. This is the evident inference to be drawn from the decision of Chief Justice Marshall in the case of the city of New Orleans *vs.* de Armas, 9 Pet., 234: "The third article (of the treaty of cession of April 30, 1803) is expressed in these words: 'The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.' No other article of the treaty is supposed to contain any stipulation for the rights of individuals. The article obviously contemplates two objects—one that Louisiana shall be admitted

into the Union as soon as possible upon an equal footing with the other States, and the other, that till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had any of these rights been violated while this stipulation continued in force, the individual supposing himself to be injured, might have brought his case into this court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were 'admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.' * * * The inhabitants of Louisiana enjoy all the advantges of American citizens, in common with their brethren in their sister States, when their titles are decided by the tribunals of the State."

III. The government of the United States is a government of powers, limited by the Constitution of the United States, and all the rights and powers not expressly delegated to it are reserved by the States. This is a proposition which requires no proof; and hence the question arises whether the power to repeal an act of confirmation—or, in other words, the power to divest private property—has been delegated to Congress? It would be a vain undertaking to look into the Constitution of the United States for the justification of the exercise of such an authority, which is, besides, contrary to the law of nations, and to that feeling of right and wrong which is the basis of all legislation. In other countries it might be necessary to inquire whether the measure contemplated was right or wrong, in an abstract sense. In the United States it is sufficient to ask whether it was expressly authorized by the Constitution? If not justified by the very terms of the Constitution, that power does not exist.

Here, indeed, we might rest the case. But as there exist other conclusive reasons why the course suggested to Congress should not be followed, and as our avowed object is to make it perfectly clear that no argument whatever can be adduced in support of the power claimed for Congress, we shall show that the Constitution of the United States expressly prohibits it. The prohibitions applicable to this case are threefold, namely: 1st. The repeal of a grant is a judicial and not a legislative act, and therefore not within the competency of Congress; 2d. It would be the taking away of our property "without due process of law;" and 3d. It would be taking private property for public use without compensation.

IV. Any measure reative to a preëxisting right of property, whether limiting or defeating it, is a judicial act, and therefore not within the authority of the legislative branch of the government, and when its object is to destroy vested rights, is contrary to the fundamental principles of government. Congress had indeed, in one instance, the power of acting upon our claim, but that was authorized by the treaty of cession, a "supreme law of the land." Congress was bound to ascertain what lands in Louisiana were private property. That once done in regard to a particular claim, Congress could no longer affect it in any

manner whatever. Whatever could thereafter by possibility be done, in regard to such a claim, must necessarily be of a judicial nature.

However difficult it may be to establish with precision the line of division between legislative and judicial powers, it has uniformly been held that any act influencing private controversies, dispensing with a general law to favor a party, or affecting vested rights, in substance, &c., is not the legitimate exercise of legislative authority, and therefore void.

In Parmele *vs.* Thompson, 7 Hill, 77, the supreme court of New York pointedly said: "The legislature has no right to determine facts touching the rights of individuals."

In Vermont, an act granting an appeal beyond the time allowed by law, was held to be a decree rather than a law, and therefore void.—(Bates *vs.* Kimball, 2 Chip., 77.)

In Maine, it has been decided that the granting by the legislature of a new trial, after the time for appeal was elapsed, is a judicial act, and void.—(Lewis *vs.* Webb, 3 Greenleaf, 326.)

"The right (that is, a patent upon a New Madrid location) thus made complete, could not have been affected by any subsequent act of Congress."—(Mills *vs.* Stoddard, 8 How., 365.)

In Duncan *vs.* Bean, 2 Nott and McCord, 405, the court says:

"It is certain that where a grant has once passed the great seal, it cannot be revoked, except by some legal proceeding, and this for the most obvious reason. The party may have it in his power to show a compliance with the condition or a release from the performance of it. (6 Comyn's Digest, 63; letter D, 70; 5 Com., 274, title Patent.) Despotic indeed would be the government which should exercise the power of revoking at will all grants of land which it may have made to individuals, or of determining, without the intervention of a judicial tribunal, where there was ground for a revocation. The usual mode in England is by *scire facias* in equity, or by process on the law side of the exchequer court. But if it were consistent with the principles of justice, that the sovereign power should of itself determine when a grant should be revoked, a second grant of land in this State should not be evidence of such revocation," &c.

Vanhorn *vs.* Dorrance, 2 Dallas, 310: "Men have a sense of property. Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the honest fruits of his labor and industry. * * * * The English history does not furnish an instance of this kind. The Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power, and not of right. Such an act would be a monster in legislation, and shock all mankind."

Ibid., page 311: "It is immaterial to the State in which of its citizens the land is vested; but it is of primary importance that, when vested, it should be secured, and the proprietor protected in the enjoyment of it."

Sharswood's note to Blackstone, vol. 2, page 346:

"In the United States, the bills of rights contained in the various State constitutions impose real and effective limitations upon legislatures, and an act may be declared void, not because it is against reason, but because it is in violation of the constitution. In most, if not all, these bills of rights, is contained the provision that no man can be deprived of his property, unless by the judgment of his peers, or the law of the land; and by 'law of the land' is meant some general law establishing a rule for the community at large. Property can only be taken for a public use, and that upon compensation made. It is not competent to the legislature to take the property of A and give it to B. (Hoke *vs.* Henderson, 4 Devereux, N. C. Rep., 1; Jones's Heirs *vs.* Perry and al., 16 Fayer, 59; in the matter of John and Cherry streets, 19 Wend., 659; Wilkinson *vs.* Leland and al., 2 Pet., 627; Norman *vs.* Heist, 5 W. & S., 171.) Private acts of the legislature are, however, frequently obtained to enable trustees to convert real into personal property, or in general, to change investments; and such acts have been held constitutional and valid. (Norris *vs.* Clymer, 2 Ban., 277.) In these cases a change of the subject-matter, for the benefit of all interested, is effected, but no change in the right or title of any of the parties. Whenever such a change has been attempted, the act has been declared unconstitutional and void."—(Norman *vs.* Heist, 5 W. & S., 171; Bumberger *vs.* Clippinger, 5 W. & S., 311; Rogers *vs.* Smith, 4 Barr., 93; Brown *vs.* Hummel, 6 Barr., 86.)

United States *vs.* Arredondo, 6 Pet., 738: "If land is granted by a State, its legislative power is incompetent to annul the grant, and grant the land to another. Such law is void. Fletcher *vs.* Peck, 6 Cr., 87."

But the case which probably exhibits in the most distinct manner the nature and limits of the legislative power, is the case of Taylor *vs.* Porter, 4 Hill, 140, decided by Judge Bronson. This case involved the validity of the statutory provision of New York, authorizing a private road to be laid out over the lands of a person without his consent.

The constitution of New York, which was in force when this controversy arose, unlike the present constitution of that State, the Constitution of the United States, and the constitutions of nearly all the States, did not contain the provision that private property should not be taken for public use without compensation. The court admitted the right to take private property for public use, making just compensation therefor, and then said:

"There is no provision in the constitution that just compensation shall be made to the owner when his property is taken for private purposes; and if the power exists to take the property of one man and transfer it to another, it may be exercised without any reference to compensation. The power of making bargains for individuals has not been delegated to any branch of the government; and if the title of A can be, without his fault, transferred to B, it may as well be done without as with a consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that here under consideration? It is not to be presumed that

such a power exists, and those who set it up should tell us where it may be found. Under our form of government, the legislature is not supreme; it is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of government, it can only exercise such powers as have been delegated to it, and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to take the property of A and give it to B, either with or without compensation? Only one clause in the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that '*the legislative power of the State shall be vested in a senate and assembly.*' It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all the legislative power of this State; but the question immediately presents itself, *what is that legislative power*, and how far does it extend? Does it reach the life, liberty, or property of the citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare. * * * * The security of life, liberty, and property lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which governments were established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing my mind to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority, if they can take the property of A, either with or without compensation, and give it to B. The 'legislative power of this State' does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power."

The reasoning of Chief Justice Marshall, in the great case of Fletcher *vs.* Peck, (6 Cr., 87,) which arose under very peculiar circumstances, throws great light upon the subject under consideration. We submit the following extracts:

Page 132. "The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

Page 134. "If the legislature felt itself absolved from those rules of property, which are common to all citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exact it."

Ibid. "Although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle on which alone this rescinding act is to be supported may be applied to every

case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient."

Page 136. "To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

"It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of tho e rules to individuals in society, would seem to be the duty of other departments."

Ibid. "A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by its own grant."

Page 138. (By the Constitution of the United States:) "No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

In this case the judgment of the court was unanimous. But Mr. Justice Johnson entertained, on two points, an opinion different from the court, and wrote a separate opinion. In this he said, (6 Cr., 143:) "I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, or the reason and nature of things; a principle which will impose laws even on the Deity."

"A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

"The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the

one or the other, not because they are not his, but because whatever is his is his country's.

"As to the idea, that the grants of a legislature may be void because the legislature is corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt."

V. The power claimed for Congress is further unconstitutional, because it would take our property without *due process of law*.

The fifth article of the amendments to the Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public uses without just compensation."

Due process of law. It is now well settled that these words are equivalent to the phrase, "law of the land," which is found in many State authorities.—(Story on the Constitution, § 1789; Sedgwick on Statutory and Constitutional Law, p. 610.)

We take the following collection and abridgment of cases and authorities from Mr. Sedgwick's work:

Page 434. "This important limitation of legislative power is to be found, I believe, without exception, in the constitutions of all the States of the Union."

Page 507. "Much discussion has taken place in regard to what is meant by the phrase, 'the law of the land.' Perhaps, in most respects, there is nowhere to be met with a better definition of it than is to be found in the argument of Mr. Webster, in the Dartmouth College case. 'By the law of the land is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not the law of the land.'"

Ibid., p. 537. "The same doctrine has been declared in a very elaborate case in the State of New York. An act of that State, authorizing private roads to be laid out over the lands of an owner without his consent, provided for the damages to be assessed by a jury of six freeholders, and declare that the road should, when laid out, be for the use of the applicant and his assigns; and in action of trespass the validity of this statutory provision came up for consideration. The constitution of the State, as it then stood, provided 'that no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land and the judgment of his peers,' (Constitution of 1821, art VII, § 1;) and also, that 'no person shall be deprived of life, liberty, and property, without due process of law.' (Ib., § 7.) After showing that the act worked a transfer of property from one individual without his consent to another, the Supreme Court held that no such legislation was compatible with

'the law of the land,' nor such a proceeding compatible with 'due process of law.' They said: The words 'by the laws of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for the purpose. In other words, you shall not do the wrong unless you choose to do it. * * * The meaning of the section is, that no member of the State shall be disfranchised or deprived of any of his rights and privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.' So of the phrase 'due process of law,' it was said: 'It cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for asserting guilt or determining the title to property. The same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment, their is no security for the others. If the legislature can take the property of A and transfer it to B, they can take A himself, or put him to death. But none of these things can be done by mere legislation. There must be due process of law.' (Taylor *vs.* Porter, per Bronson, J., 4 Hill, 140.) In North Carolina and Tennessee the term 'law of the land' has received the same construction.''—(Hoke *vs.* Henderson, 3 Dev., 12; Jones *vs.* Perry, 10 Yerg., 59; see, also, in Iowa, Reed *vs.* Wright, 2 Greene, Iowa, 22; in Texas, James *vs.* Reynolds, 2 Texas, 251; in Pennsylvania, Brown *vs.* Heummel, 6 Ban., 87; and Ervine's appeal, 16 Penn. R., 256; Kinney *vs.* Beverly, 2 Hen. & Munf., 336; Arrowsmith *vs.* Burlingim, 5 McLean R., 498; and Blackwell on Tax Titles, 27, 34.)

Ibid., p. 359. "In New York the subject has been again recently considered in reference to the temperance law. An act passed in 1855, (9th April,) entitled 'An act for the prevention of intemperance, pauperism, and crime, declared substantially that intoxicating liquor should not be sold or kept for sale, except for medical, sacramental, chemical, and mechanical purposes; and a violation of this provision was declared a misdemeanor, punishable by fine and imprisonment.' It was further enacted, that, upon complaint of a violation of this prohibition, liquor illegally kept should be seized; and if found to be kept in violation of the act, or if not claimed, should be adjudged forfeited, and destroyed. Proof of the sale of liquor was to be considered sufficient to sustain an averment of an illegal sale, and proof of delivery to be *prima facie* evidence of sale. No person was to be allowed to maintain an action to recover for any liquor sold or kept by him, unless he could prove that the liquor was lawfully sold or kept within the act; and finally, it was declared that all liquor kept in violation of the act should be deemed a public nuisance.

"Tonybee and Berberich, having been found guilty of violating the act, appealed to the supreme court, and the act was held to be in conflict with the constitutional provisions above cited. It was considered that the object of the statute was to prohibit the common and ordinary use of property long and familiarly known; that liquor came clearly within the definition of property; that the prohibition of its sale worked a virtual deprivation of property; that to do this by fines, forfeitures, and imprisonment, coupled with a presumption against nuisance, was not due process of law; that the right of protection belonging to the citizen was seriously impaired by requiring him preliminarily to prove that the liquor was lawfully kept; that it was not competent for the legislature to declare any recognized species of property a nuisance; and that the whole act was void, as being an arbitrary interference with the rights of property, guarantied by the Constitution."—(People *vs.* Barberich & Tonybee, 11 How. Pr. R., 289.)

This decision has been affirmed on appeal.—(Wynehamer *vs.* The People, 3 Kernan, 378.)

Page 541. "The vested interest of a husband in a legacy bequeathed to his wife, cannot be altered by subsequent legislation; and the act of 1848, by which it was attempted to act retrospectively, is unconstitutional, on the ground that it takes away property without *due process of law.*"—(Westervelt *vs.* Gregg, 2 Kernan, 202.)

Page 610. "So also in Rhode Island, on the first circuit, Mr. Justice Curtis has decided, under the constitution of that State, that the phrase 'law of the land' is equivalent to 'due process of law,' and that it is necessarily implied, and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it be proved; and when a law of the State of Rhode Island, passed in 1852, designed to prevent the sale of intoxicating liquors, required the accused, before he could answer to or contest the charge, to give security in the sum of two hundred dollars, with sureties, to pay all fees and costs adjudged against him, it was held that this provision conflicted with the constitution, and rendered the law void. (Greene *vs.* Briggs, 1 Curtis, 311.) In 1853, the State of Rhode Island passed another liquor law, which was also declared void for a similar reason. (Greene *vs.* James, 2 Curtis, 189.) To the same effect is the decision in Webster *vs.* Cooper."—(14 How., 488.)

VI. The repeal of the confirmatory act would be taking private property for public use, without compensation. This is likewise prohibited by the fifth article of the amendments to the Constitution.

Nor would there be the least difference in principle, if, instead of annulling the grant in toto, Congress were to declare that the Houmas claimants should be authorized to sue the United States, as if no confirmation had taken place. This would be a declaration by Congress, that they mean to treat and consider as public property, what they previously had declared to be private property. If such a course did not take away the land itself, it would take away the confirmation, which is also a right, a property, and an immunity from further vexation. Thus, if a court took a more contracted view of the meaning of the grant than the commissioner and Congress had done before, the claimants might lose a portion of the land embraced in the confirma-

tion. Such an act would, therefore, at least be an indirect taking of property, which is as unconstitutional as absolute and direct spoliation.

An act of Congress which would take private property without compensation, whether for public or private use, would not be a law, but a mere act of power to which no court would give validity. Such is the tenor of the language of the Supreme Court of the United States in Fletcher *vs.* Peck, (6 Cr., 87.) And, indeed, the authorities we have submitted under the two preceding heads cover this ground entirely, and we therefore dismiss it, referring only to some other authorities, if further examination should be desired.

Bloodgood *vs.* the Mohawk and Hudson R. R. Co., 18 Wend., 59.
Matter of John and Cherry st., 19 Wend., 659.
In the matter of Albany street, 11 Wend., 151.
Varick *vs.* Smith, 5 Paige, 137.
Tonawanda R. R. Co. *vs.* Munger, 5 Denis, 255.
Wallace *vs.* Karlenowefski, 19 Barb., 118.
Plank Road Co. *vs* Thomas, 20 Penn. R., 90.

VII. All these principles apply to our case, and show the entire want of power in Congress to do anything in opposition to the confirmation of our claim by the act of 1858.

Legislative assemblies are governed by precedents, and the circumstance that, during the long existence of this government, while Congress must frequently have been importuned by parties whose interests were in conflict with parties who were in possession of rights derived from and vested by acts of Congress, the national legislature never attempted to interfere, affords strong evidence that the non-existence of such a power never was questioned.*

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*The act of August 4, 1854, the second section of which repeals an act of June 29, 1854, entitled, "An act to aid the Territory of Minnesota in the construction of a railroad therein," is no exception to this rule. The circumstances of that case show very clearly that it does not fall under the principles stated and supported in this argument. On the 4th of March, 1854, the territorial legislature of Minnesota passed an act incorporating the Minnesota and Northwestern Railroad Company, the 8th section of which provided, "that any lands that may be granted to the said Territory to aid in the construction of said railroad shall be, and the same are hereby, granted in fee simple" to the said railroad company. The act of Congress of June 29, 1854, granted to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad, the locality of which was described, every alternate section of land, designated by odd numbers, for six sections in width on each side of said road. But it seems that Congress was informed of the aforesaid act of the territorial legislature in favor of the Minnesota and Northwestern Railroad Company, and intended to exclude that company from the benefit of a donation; for the 3d section of the act of August expressly directed that the said lands should not inure to the benefit of any company heretofore constituted *or* organized. Thus the act was passed; but it appears that by some fraudulent maneuver it read as promulgated, "constituted *and* organized," thus attempting to prevent the exclusion of the Minnesota and Northwestern Railroad Company, which was constituted before the date of the act of Congress, but organized only after that date. This discovery excited the indignation of Congress, and induced the passage of the act of August 4, 1854, which repealed that of June 29, 1854. The company continued to contend that by the former act, in conjunction with the territorial act, they had a vested right to the alternate odd sections along the line of their road.

The matter was brought before the Attorney General and the Secretary of the Interior, and those officials concluded to disregard the claim of the railroad company, and have always done so. This course was justified and vindicated in the letters of the Commissioner of the General Land Office to the Secretary of the Interior, dated November 2, 1855, and June 22, 1857. These letters contain a full and able argument on the whole case. While admitting that the duty of executive officers is restricted to the execution of the laws, they do not confine themselves to this plea. They justify the act of August 4, 1854, by showing that no *vested* right has been divested by it. When the repealing act was passed, the road had not

But if the opponents of the Houmas claim made other and very different demands upon Congress; if they demanded what is clearly within the constitutional power of Congress—though what that would be, cannot easily be imagined, since by the confirmation, the authority of Congress over this claim is terminated—it ought to be refused upon considerations of equity and fairness, peculiar to this case, independently of the merits of the grant, which form the subject of the second part of this argument.

In Menard *vs.* Massey, 8 How., 306, the Supreme Court of the United States says: "By the third article of the treaty by which Louisiana was acquired, and by the laws of nations, the inhabitants of the ceded territory were entitled to be maintained and protected in the free enjoyment of their property."

The United States were under the necessity of ascertaining what was public and what was private property in the country ceded by France, both because they had bound themselves to protect private property until Louisiana shall become a State, (City of New Orleans *vs.* De Armas, 9 Pet., 234, heretofore referred to,) and because they had purchased the public lands which had to be prepared for sale and settlement. They therefore were under the necessity of establishing the rigorous, though unavoidable, presumption, that all lands to which a private right could not be shown, should be considered and treated as public lands. The stringency of this principle was, however, tempered by the prompt establishment of tribunals for the ascertainment and acknowledgment of private claims. The first of these acts was that of March 2, 1805, (1 Land Laws, 122.) The 4th section of this act describes what evidence persons claiming under complete and incomplete French and Spanish grants had to submit to the boards of commissioners. And by the 5th section, these commissioners were "*to decide in a summary way*, according to justice and equity, on all claims filed," and their "decisions were to be laid before Congress in the manner hereinafter directed, and *be subject to their determination thereon.*"

The terms of this act show that its framers were aware that the necessity of the case and the dictates of common justice required that this investigation should be promptly closed, and the apprehensions of the inhabitants be quieted. The commissioners were to decide in a summary way, and it was to be inferred that Congress would act with all practicable expedition. These requirements fell harshly upon the inhabitants who had changed their allegiance. Accustomed to a patriarchal government, which granted laws for the asking, and never disturbed any man's possession, (Morale's regulations, inspired by new-born official zeal and disputes with the governor, are known to have been *brutum fulmen*,) they had often neglected their title papers.

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yet been located, and the land to which the Territory would have been entitled, but for that act, was not yet known or designated. Moreover, the 4th section of the act of June 29, 1854, expressly provides, that "no title shall vest in the said Territory" until certain conditions were complied with, and a compliance with these conditions had not even been commenced when the prospective conditional grant was repealed.

The railroad company was alone a loser by the repeal of that act. The Territory and State of Minnesota afterwards received a greater quantity of land for similar purposes, no longer fettered by its promise to the Minnesota and Northwestern Railroad Company, contained in the act of the territorial legislature of March 4, 1854.

With much trouble they collected them, and when they submitted them they had a right to hope and expect a prompt answer from the tribunal to which they had been referred.

The United States established their own tribunals in their own cause. It could not be otherwise; but as a just nation, they were bound not to suspend the course of justice indefinitely, and still less to change the tribunals, from motives of expediency hostile to the claimants. These tribunals were the board of commissioners, acting in the first instance, and Congress acting as the appellate tribunal in the last resort. These were special tribunals, and no other authority or court in the country had any jurisdiction in the matter. From the moment the act of March 2, 1805, was passed, the Houmas claimants could not take a single step in opposition to it. Their claims were confirmed by the board of commissioners on the 3d and 10th of March, 1806. The record was not removed into the appellate court, Congress, until the 9th of January, 1812; and but for the promised "final determination" by the act of June 2, 1858, their and all the other claims embraced in that voluminous report, exceeding a league square, would still be undecided. And would it be fair, under these circumstances, to keep them still longer in suspense, even if it could be done constitutionally?

As on this point, in the moral aspect of the case, it is of great importance to show that the tribunals established by Congress for these claims are exclusive of all others, we submit some authorities:

By an act of March 3, 1815, (3 Statutes at Large, 114,) commissioners were appointed to adjudicate on the rights of certain claimants to lands in Mississippi Territory. A decision of this board gave rise to a suit between private individuals, and the Supreme Court of the United States held (Brown *vs.* Jackson, 7 Wheaton, 240,) that as no appeal had been given from the decision of these commissioners, the Supreme Court had no right to review or disturb their decisions made with the authority delegated to them.

By an act of August 3, 1846, (9 Statutes at Large,) the Commissioner of the General Land Office, the Secretary of the Treasury, and the Attorney General were appointed to decide on all cases of suspended entries. In Foley *vs.* Harrison, 15 How., 450, the decision of this board was held final.

To the same effect are the decisions in Elliott *vs.* Peirsol, 1 Pet., 328; Wilcox *vs.* Jackson, 13 Pet., 498; and Cousin *vs.* Blanc's Executor, 19 How., 209.

Hence it follows, that if the claimants had not construed the long silence of Congress as an acquiesence in the decision of the commissioners, if they had set up their claim as plaintiffs in any court of justice, they would have been met by the unanswerable objection, that their claim was pending before a special tribunal, which alone could take cognizance of it, and which had not yet decided on it.

It may be asked, by those unacquainted with the working of this system, whether the Houmas grant, being a complete grant, could not have been established in a court of justice, independently of any confirmation. The 4th section of the act of March 2, 1805, seems to make optional in cases of complete grants, what is absolutely required in

cases of incomplete titles. But this difference soon vanished in practice, and in reality they all stand upon the same footing. The General Land Office respects no grant whatever that has not been expressly confirmed. Without a confirmation it ignores them; it has no right to confirm or acknowledge them upon its own judgment, and the claims are known to that office only through the confirmations. By the 4th section of the act of April 25, 1814, even complete grants in certain parts of Louisiana were required to be filed, under the penalty that, if not recorded, they should never afterwards be recognized or confirmed, or received as evidence against a title received from the United States. If not confirmed, or at least filed for confirmation, the land office would proceed to the sale of the land, whatever the title may be; and after the land should have been parcelled out among purchasers of small tracts, its ownership would be converted into lawsuits, and its value gone. Hence it is that the reported decisions of the federal courts do not exhibit a single instance of an unconfirmed complete grant as the basis of a suit in a petitory action, or in action of ejectment. That the practice of the General Land Office has been correctly stated, will appear from the letter of the Commissioner of the General Land Office to the undersigned counsel, dated the 28th ultimo, which is printed in the Appendix.

If, therefore, Congress would now refer the Houmas claimants to the federal courts for a new adjudication of their claim, it would virtually amount to this: that after having called these parties before their own tribunals, and after these tribunals, both in the first instance and on appeal, have decided in favor of the claim, Congress, dissatisfied with this decision, would annul it, and create another tribunal to try the case *de novo*. If the case is correctly stated—and of that there can be no doubt—then it bears no discussion. It would be one of the class of cases which we quoted when speaking of the constitutional prohibition to take property *without due process of law*.

As all titles which existed in Louisiana, Arkansas, and Missouri, before the treaty of cession of 1803, ultimately had to be, and were, adjudicated upon and confirmed by Congress, it would follow, if our title would now be disturbed by Congress, that any of these titles might be attacked before and opened by Congress, and success would depend upon the influence exercised by the contestants.

PART SECOND.

If, notwithstanding the want of constitutional power, Congress should wish to review the case, were it only to satisfy themselves whether the decision to be made is in reality conformable, not only to law, but to equity, we are prepared to discuss the original merits of the grant.

On this subject we shall submit evidence to the honorable committee, and it will be necessary in the first place to explain the nature of this evidence.

In 1837, Mr. John S. Preston, on behalf of the widow and heirs of the late General Wade Hampton, who was largely interested in the Houmas claim, submitted a memorial to Congress, accompanied by

documentary evidence, which was ordered to be printed by the Senate on January 29, 1838. It is Senate Document No. 144, of the 25th Congress, 2d session. When referring to it, we shall designate it as Senate document of 1838.

On August 12, 1844, Chancellor Bibb, the Secretary of the Treasury, ordered patents to be issued on two of the three claims made under the Houmas grant.

The opponents of the claim addressed strenuous and emphatic remonstrances to Congress, the consequence of which was that, by a resolution of the Senate, of December 10, 1844, the Secretary of the Treasury was required "to communicate to the Senate a copy of his written opinion, addressed to the Commissioner of the General Land Office, directing patents to be issued in favor of the claimants under the Houmas claim, in the State of Louisiana," &c.

In consequence of this call, Mr. Secretary Bibb made a communication to the Senate, dated January 8, 1845, which, on January 13, 1845, was ordered to be printed by the Senate, and is Senate Document No. 45, of the 28th Congress, 2d session. This we shall designate in our references as Senate document of 1845.

By prolonged agitation the adversaries of the claim succeeded in procuring the passage of a joint resolution by Congress, on the 26th of June, 1846, the purport of which was that the Attorney General of the United States was to examine the title of the Houmas claim, and to report thereon to the President, and if he found that patents under such claim had been issued contrary to law, the President was requested to cause proceedings to be instituted for the purpose of having the validity of such patent or patents judicially determined.

Thereupon Mr. Attorney General Clifford gave an official opinion, dated the 31st of December, 1847.—(4 Opinions of the Attorneys General, 643.)

The foregoing three documents, viz: the Senate document of 1838, the Senate document of 1845, and the opinion of the Attorney General, having been printed by authority of Congress, it was necessary to indicate the collections in which they are to be found. We submit, however, copies of them besides.

The Attorney General concludes his opinion in the following words:

"In conclusion, I am of opinion—

"1st. That the grant to Maurice Conway is a complete and perfect Spanish grant, to the extent of forty-two arpents from the river, and no more; that the said grant does not convey any lands beyond that extent; but that the title to the same is vested in the United States.

"2d. That the patents which have been issued in the case of the Donaldson and Scott claim, were so issued without authority of law, and are, therefore, void and without effect."

In consequence of this opinion, a suit was instituted in the name of the United States, to set aside the patents issued by direction of the Secretary of the Treasury on the Clarke and Donalson and Scott portions of the Houmas claim.

This suit was tried and decided by the United States circuit court at New Orleans, presided over by Mr. Justice J. A. Campbell, of the Supreme Court of the United States. In this decision, which was

rendered on the 21st of November, 1856, the court held that the act of April 18, 1814, upon which the Secretary of the Treasury had based his decision that patents should issue, did not apply to complete grants exceeding a league square, like the Houmas claim. But the court confined itself strictly to the object of the resolution of Congress, and concluded the decision in the following words:

"I do not decide any question upon the validity of the defendant's title to the land they claim, nor upon the effect of any other act of the officers of the land office, in respect to it, in determining its boundaries, nor the effect of this patent, in any other respect than of its being a paper issued without legal authority."

We submit, also, written evidence, properly attested, which will, with more propriety, be described as we come to it. Among this are the title papers, surveys, and other proceedings in other confirmed Louisiana claims, which we shall use as precedents. That they are fit *precedents* will directly be shown. All these are certified by the register of the land office at New Orleans, as extracts from the records of the board of commissioners.

The only question to be examined, is the depth from the Mississippi river to which the claim is to extend.

The commissioners under the act of 1805, Mr. Charles Hopkins, Solicitor of the General Land Office, and Mr. Secretary Bibb, held and decided that the Houmas grant extended to the full depth claimed, that is, the Amite river and Lake Maurepas. (Senate Doc. of 1845, pp. 85, 126.) Solicitor Birchard, of the General Land Office, would limit it to a league and a half in depth, (Senate Doc. of 1845, p. 40,) and Mr. Attorney General Clifford, it has been seen, holds that its depth is only forty-two arpents from the Mississippi.

Hence, it is apparent that the only matter that ever was disputed in relation to the grant was its depth. A translation of the title papers is found on page 954 of Clarke's Land Laws, and also in the Appendix of the first volume of Biören's Laws of the United States, page 551. But it is unnecessary to recite the title at length, because it is evident that the controversy turns exclusively upon the meaning of certain words of the grant of the rear land made by Governor Galvez on June 21, 1777.

By this the governor granted to Maurice Conway, "*toda la tierra vacante y detras o á la espalda de los quarenta primeros que posee;*" literally, "all the land vacant behind and in the rear of the first forty which he possesses."

The order of survey by Governor Unzaga, the survey by Andry, and the final grant by Governor Galvez, expressly state the extent of the front on the Mississippi, the direction and course of the side lines, which open very widely, and that the side lines of the rear grant are to be prolonged in the same direction as those of the front grant. All this has never been disputed, and requires no further notice here.

Yet it may be proper to submit a summary statement of the title, to explain how the difference of opinion concerning the depth arose.

On the 9th of September, 1776, Maurice Conway, who was then the sole owner of the front tract, petitioned Governor Unzaga to grant to

him all the vacant land in the rear of the first depth of forty arpents, of which he then was possessed.

On the 27th September, 1776, Governor Unzaga issued an order of survey, directing Andry, the government surveyor, to put the petitioner in possession of the vacant land in the rear of his first forty arpents.

On the 9th of October, 1776, Andry went on the ground, in company with Maurice Conway, Louis Judice, the commandant of the post or district, and the Indian chief who had sold the original front tract. There he measured the front line of ninety-six arpents on the river; then he retraced the side lines to a depth of forty arpents, planted stakes at the end of forty arpents, and other stakes two arpents farther back, "*para no deviar el rumbo,*" which has been translated, "in order not to vary the direction," and by another translator, "in order to keep the course."

Upon the coming in of a sketch of this survey, Governor Galvez, Unzaga's successor, made, on the 21st of June, 1777, a complete grant to Maurice Conway of all the land lying in the rear of the first forty arpents, following the same direction, and referred to Andry's survey.

Thus the question arose, what was meant by "all the vacant land in the rear of the first forty arpents?"

The literal meaning for which the claimants contend is, all the land in the rear, between the prolongation of the side lines, which the government had a right to give; that is, as far back as the Amite river and Lake Maurepas, the first considerable water-courses, and at the same time the boundary between Spanish Louisiana and the British province of Florida. This, on a straight line drawn from the Mississippi, in the center of the front of the grant to the Amite, gives a depth of about thirteen or fourteen miles. The side lines, owing to their divergence, are considerably longer.

On the part of the opponents of the claimants, it is contended that, as Andry planted no stakes further back than forty-two arpents from the river, the grantee took only what was included between these side lines of forty-two arpents in depth and a rear line connecting the extremities of the two measured side lines.

As Congress always was the supreme appellate tribunal in the adjudication of land claims submitted to boards of commissioners, exclusive of every other jurisdiction; as, notwithstanding a previous final decision, we are again called before this tribunal by the petition of our adversaries, we are compelled to illustrate the question thus presented as we should do it before a court of Congress, however much we may regret that we cannot spare to the honorable committee these wearisome details.

The question then is, how are the words used in the grant, and in the survey to which the grant refers, to be construed? Certainly not according to the rules applicable to the description, location, and survey of grants in England and the United States, but as they were understood in Louisiana by Andry, the surveyor, and Galvez, the governor, themselves, at the time of these occurrences.

It is because this obvious rule was not adhered to, or rather because the materials for applying it were wanting, that the authorities in

Washington city differed from the commissioners of 1806, who resided on the spot, and were in possession of those materials.

And herein lies the whole difficulty of this class of cases; a difficulty often felt by the Supreme Court of the United States, as is forcibly stated by that court in Bissell *vs.* Penrose, (8 How., 331:) "The inquiry was difficult and embarrassing, on account of the scarcity and imperfect materials within the reach of the courts from which to collect Spanish laws and ordnances, as they consisted of royal orders, orders of the local governors, and also the usages and customs of the provinces, which were not readily accessible to the profession or the courts in this country."

In United States *vs.* Arredondo and others, (6 Pet., 691,) the Supreme Court examined this subject very thoroughly. The court said, (p. 717): "From a careful examination of the whole legislation of Congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has from their beginning been intended that the titles to the lands claimed should be settled by the same rules of construction, law, and evidence, in all their newly-acquired territory; that they have adopted, as the basis of all their acts, the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested whether it was *property* at the time the treaties took effect."

Ib., p. 718. "From the whole scope and spirit of the laws on the subject of Spanish titles, the intention of Congress is most clearly manifested that the tribunals authorized to examine and decide on their validity, whether special or judicial, should be governed by the same rules of law and evidence in their adjudication on claims of the same given character."

Ib., p. 719. "The selection of this tribunal for a final and conclusive adjudication of the large claims, affords neither an indication of the intention of Congress, nor furnishes us any reason that in the exercise of that jurisdiction we should consider that 'the principles of justice,' the rules of a court of equity, 'the law of nations,' of treaties 'of Congress,' or 'of Spain,' the rules of evidence, or 'the principles of law,' can be at all affected by the magnitude of the claim under consideration. The laws which confer the authority and point to the guides for its exercise make no such discrimination, and every 'principle of justice' forbids it."

Ib., p. 713. "Our next rule of decision is, 'and proceedings under the treaty.' By these are understood the acts and proceedings of the government, or others under its authority, subsequent to the treaty, in taking possession of the ceded territory, in organizing the local government, its acts within the authority of the organic law, the promises made, the pledges given by either the general or local government; also the proceedings of commissioners and other officers or tribunals appointed by Congress to decide and report on these claims, so far as they have adopted and settled any rules and principles of decision within their powers as guides to their judgment. These, in our opinion, are the 'proceedings under the power referred to, and intended by the law, according to which we may decide, and are made a rule or precedent for us.'"

Ib., p. 713. "Where Congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised, or which is to all intents and purposes of the same effect in law. It is a legislative ratification of an act done without previous authority, and this subsequent recognition and adoption is of the same force as if done by preëxisting power, and relates back to the act done."

Ib., p. 714. "There is another source of law in all governments, usage, custom, which is always presumed to have been adopted with the consent of those who may be affected by it. In England, and in the States of this Union which have no written constitution, it is the supreme law, always decreed to have had its origin in an act of a State legislature of competent power to make it valid and binding, or an act of Parliament, which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. (2 Co. Inst., 58 Wills, 116.) So it is considered in the States, and by this court. (3 Dall., 400, 2 Pet., 256, 257.)"

"A general custom is a general law, and forms the law of a contract on the subject-matter; though at variance with its terms, it enters into and contests its stipulations as an act of Parliament or State legislature. This court not only may, but are bound to notice and respect general customs and usage as the law of the land, equally with the written law."

So, again, in Mitchel and al. *vs.* United States, (9 Pet.. 741,) the court say:

"The confirmation of similar grants by acts of Congress, or by boards of commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority of these officers; and being proceedings under the treaty and laws, they are made a rule by which, among others, we may adjudicate on the claims of the present parties."

To the same effect is the case of Smith *vs.* The United States, 10 Pet. 331.

These principles, so convincingly stated by the Supreme Court, apply with great force to our case.

Those who contest the extent we claim for the Houmas grant, urge, that while it is true that the grant of Governor Galvez gave to Maurice Conway "all the vacant land behind or in the rear of his first forty arpents," between the prolongation of the side lines of the front tract, this description is too vague to attach to any particular land, may render the grant void for uncertainty, and can at best be only explained by consulting the certificate of Andry, to which the grant refers. This is found in the original Spanish, in Sen. Doc. of 1845, p. 8, and translated in Sen. Doc. of 1838, p. 18. From this certificate, it appears that Andry went on the spot, measured the front of the first grant on the river and its two side lines, each to the depth of forty arpents, and that at the end of these side lines he planted a post, and other posts, two arpents farther back, to indicate the second grant;

that consequently the only land of which Andry gave possession to Maurice Conway, under the second grant of 1777, was what lay two arpents further back of the depth of the original grant, and that consequently the two grants combined should be restricted to forty-two arpents from the river.

This might be plausible and logical reasoning, if the "proceedings" of Andry were to be construed as an English or American grant or survey might be construed. Such, however, is not the rule of decision, as has been shown by the above-mentioned decisions, and is shown, with particular reference to surveys, by the following decisions of the Supreme Court of the United States:

In Buyck *vs.* the United States, 15 Pet., 224, the Supreme Court say: "In coming to our conclusion upon this point, we have not been influenced by any of the English common law rules, which make grants void for uncertainty; such as, for instance, if the king grants lands in a peat waste, without ascertaining what part, or the special name of the land, or how bounded, it is void for uncertainty, for there can be no election in that case. (Bacon, vol. 4, tit. Grant, 81.) And yet, if an individual so grant, it would be good. We apply to the case the laws and ordinances of the government under which the claim originated, and that rule which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony."

In The United States *vs.* Low., 16 Pet., 167, Mr. Justice Catron says: "According to the strict ideas of confining a survey to a location in the United States, the survey would be located adjoining the natural object called for, there being no other to aid and contest the general call; and therefore the head of the lagoon would necessarily have formed one boundary; but it is obvious more latitude was allowed in the province of Florida."

In the case of Smith *vs.* the United States, 10 Pet., 331, the Supreme Court held: "It has also been distinctly decided, in the Florida case, that the land claimed must have been severed from the general domain of the king, by some grant which gives it locality by its terms, by a reference to some description, or by a vague general grant, with an authority to locate, which must have been made before the 24th of July, 1818."

The cases of the United States *vs.* Forbes, 15 Pet., 181; O'Hara *vs.* The United States, 15 Pet., 275; United States *vs.* Clark, 16 Pet., 231, are signal instances of the latitude which was allowed in surveys. Indeed, a survey was by no means indispensable to the validity of a grant.

In the case of The United States *vs.* Arredondo, 13 Pet., 134, the Supreme Court say: "We do not consider the want of a survey as interfering with the right of the party to the land granted; but it must be taken, near as may be, as it is described in the petition, where it was asked for, and as it was granted, and cannot be taken elsewhere. If it cannot be found there, the appellees have no claim to an equivalent; or, if upon the survey, it shall be found to interfere with

previous grants to third parties, the concession will be lessened in quantity, according to the extent of the rights of third parties, and an equivalent for such diminution cannot be surveyed elsewhere."

The only ruling and universal principle applicable both to Spanish grants and surveys, was: *Id certum est quod certum reddi potest.* A description which, by the aid of extraneous testimony, could enable a surveyor, acquainted with the country, to locate a grant with a reasonable degree of adherence to the presumable intentions of the grantor, is all that would be required; and our grant comes entirely within that rule.

We have no difficulty in doing away entirely with the objections drawn from the fact that Andry ran the lines of the new grant only two arpents back of the terminus of the first grant, and did not close the back line at all. In this respect Andry followed a usage universal in Lower Louisiana, in all grants having a great depth.

This section of country is a flat alluvial plain, covered with woods, subject to periodical overflows of the Mississippi, except when protected by embankments. The land is highest on the immediate banks of the river, where the overflows deposit the coarser particles of the detritus held in suspense in the water. The rear lands are mostly very low, covered with water a great part of the year, and even when the river is low, very generally marshy and difficult to penetrate. Land had little value in those days; but the labor of a superior officer, such as the surveyor general of the province always was, had value, and as the payment of this labor was the only charge incumbent upon the grantee, it was diminished as much as possible. The surveyor general, therefore, very frequently confined himself to run the front line on a water-course, and to stake off the side lines for a distance short of the forty arpents granted. As these side lines were always straight lines, and as the depth was indicated in the grant itself, this sufficed to give to the grant a fixed locality, which could be traced upon the ground, without liability to error, by any surveyor that might come afterwards. On this point our evidence is perfectly conclusive, and as this point is the main reliance of our adversaries we shall discuss it very fully.

We applied for information and evidence on this subject to the surveyor general of the United States in Louisiana. In reply, the undersigned counsel received from him a letter, dated the 28th of last January, and the documents mentioned in it. All these are respectfully submitted as document A.

The material parts of the letter are as follows:

I now send you the affidavit requested to the fact that the French and Spanish surveyors did not generally survey to the full depth the side lines of tracts on the river, but merely measured their fronts, and established bornes, or posts, at regular intervals from each other, and at short distances from the river on such side lines, for the purpose expressed in their *procés verbal*, of indicating their direction. This was sufficient to comply with the requirements of the order, in virtue of which the survey was made; nor was more required by the grantee, for he and the neighbor on either side signed, with the surveyor, the *procés verbal*, therein expressing satisfaction therewith.

Inclosed is a certified list of a few of the very many instances where this rule was followed by the French and Spanish surveyors.

I cannot conceive with what reason it can be asserted that the establishment by Andry, in the survey of the Conway claim, of posts at the distance of forty-two arpents from the river, restricted it to this depth; for he expressly states their only purpose was "in order to keep the course" of the prolongation of the side lines. And this was his frequent custom.

Two instances occur at once to my memory—those of the claims of Piseros and D'Etrepy. (Old board reports, Nos. 88 and 3, in T. 12 S., R. 8 E., S. E. district, east of the river.) I inclose copies of my rough translations of his *procés verbal* in both these surveys. You can have them verified and compared with the records of the register of the land office in New Orleans. In these surveys, for the same purpose as fully expressed, he established posts at forty-two arpents from the river; and yet the claims have been surveyed, and even respected by the United States, with the entire depth to the lake.

In townships 12 and 13 S., R. 10 E., S. E. district, east of the river, you will find several claims (those of Fortier and others) where the surveyor, Lalande de Ferrières, in 1765, ran out the side line less than twenty arpents from the river, and then upon another course established, at one or two arpents further, bornes, to show the direction of the prolongation to Lake Pontchartrain, thus rendering the side lines broken, and not always parallel. They have been so resurveyed by our Government.

Respectfully, your obedient servant,

W. J. McCULLOH,
Surveyor General Louisiana.

LOUIS JANIN, Esq., *New Orleans.*

The affidavit mentioned in this letter is as follows:

I, William J. McCulloh, surveyor general of public lands in the district of Louisiana, solemnly swear, it is within my knowledge, derived from frequent reference to the plats of survey, (original or copies filed in this office,) that it was the general custom of the surveyors employed by the French and Spanish governments, in locating tracts in the province of Louisiana, having a depth of forty arpents, merely to measure the fronts of such tracts, and to indicate the courses of the side lines by planting bornes or posts at equal intervals from each other, and at short distances from the river, without actually running and measuring the full depth of such side lines, and without closing the survey by running the rear line between the extremity of such side lines; and that in tracts having greater depth than forty arpents, or a depth extending to another river, lake, or other natural boundary, it was their custom, *invariably followed*, as far as I can ascertain, after careful examination, to measure to the forty arpent points on such side lines, and then at short distances therefrom to establish bornes or posts, to exhibit the further prolongation of the side boundaries.

WILLIAM J. McCULLOH,
Surveyor General, Louisiana.

Sworn to, and subscribed before me, at Donaldsonville, Louisiana, this 28th day of January, A. D. 1860.

CHARLES S. ILSLEY,
Justice of the Peace.

The next document included in his letter is a certificate giving a list of 63 confirmed claims, which were surveyed by French and Spanish surveyors, in the manner described in Mr. McCulloh's letter and affidavit, and have been acknowledged and confirmed by the United States in conformity with these surveys.

At the bottom of this list Mr. McCulloh gives the following certificate:

SURVEYOR GENERAL'S OFFICE,
Donaldsonville, La., January 28, 1860.

I certify, that by authenticated copes of the plats in this office, by Lewis Andry, Lallande de Ferrieres, Carlos Trudeau, Manuel Andry, and F. V. Potier, it appears they did not, in any of their surveys of the above-mentioned claims, run the side lines to the full depth claimed, but that they only measured their river fronts, and on the side lines established bornes to indicate their direction.

The above cases are taken indiscriminately, and many other analogous cases could be cited to show that it was the rule of the French and Spanish surveyors in Louisiana to make only such partial surveys of claims fronting on the Mississippi river.

WILLIAM J. McCULLOH,
Surveyor General, Louisiana.

Document A also contains translations of the title papers, *procés-verbals* of French and Spanish surveys, and plans made by French and Spanish surveyors, all belonging to titles confirmed by the United States. They fully prove Mr. McCulloh's statements in his letter to the undersigned.

Before the claimants had receive this very satisfactory evidence from the surveyor general of the United States for the State of Louisiana, they had procured from the office of the register of the land office at New Orleans, who has in charge all the records of the various boards appointed to adjudicate and report on land claims in the southeastern district of Louisiana, copies of title papers in confirmed claims, upon which the confirmation was based, and which, therefore, according to the Supreme Court of the United States, are to be considered as proof of usages and customs existing when rights accrued under the former government of Louisiana, and therefore to be respected by the United States. We submit them as documents B, C, D, E, F, G, H, I, K, L, M, and N. Each of these documents is certified by the register of the land office as having been given in evidence in support of a particular claim, and the number of the claim; the report in which it was embraced, and the act by which it was confirmed, are stated in the register's certificate. Each of these documents is accompanied, either by a translation of its material parts, or has on the cover a statement hat they are translated in this brief. Thus the fullest opportunity for

examination is afforded to those whose duty it may be to enter upon this inquiry, and they will be found fully to support our explanations of the usages and customs of the time. We are painfully aware that the minute examination in which we are engaged cannot be otherwise than irksome to the committee, as it is to ourselves. But this is not our fault, it is the fault of Congress. Congress constituted itself the supreme tribunal in these matters, and forced the owners of the Houmas claim to appear before them. They have been before Congress since the 9th of January, 1812. At last, on June 2, 1858, Congress disposed of the matter. And now the petition of certain intruders upon our land compels us to appear again before Congress. Congress having assumed jurisdiction over the matter, can no more than any other court decline the investigation of the facts, upon the decision of which the controversy depends. And we hope, therefore, not to be blamed if we give to our examination that extension which the abundance of material puts within our power, and which the special character of the subject, and its novelty to those who are to investigate it, imperiously demand.

Yet we shall specially mention only a few of these documents. In connection with the evidence furnished by Mr. McCulloh, we must, however, refer to document B, which embraces the original order of survey, *procés verbal* of Andry, and complete title, in the claim of Dominique Bouligny, confirmed as claim No. 313 by the old board, (2 Public Lands, 286.) This, with the exception of the description of the land, is almost literally the same title which Maurice Conway had obtained, namely, a petition by Ducros, a first decree by Governor Unzaga, ordering the surveyor to put the petitioner in possession, a report by Andry, and a final grant thereon by Governor Galvez. This explains better than any philological disquisition, how Andry and Galvez understood these matters, and by itself puts to rest the reasoning of our adversaries who would interpret them differently. The petitioner asks for the land behind his first forty arpents as far as Lake Barataria. Unzaga orders Andry to put him in possession of the land claimed. Andry goes on the ground, as he says, "in consequence and in obedience of that decree," is accompanied by the grantee and his neighbors, measures the side lines to the depth of forty arpents, and then two arpents further back, where he plants other and the last posts. Upon this the governor decrees that, considering Andry's report, from which it appears that he had put Ducros in *possession* of the land petitioned for to the lakes, he grants that land.

Let it be observed that Andry does not say one word about possession; yet the governor construes that Andry's going upon the land newly granted to the depth of two arpents, in company with the grantor, is putting him in possession of the whole grant. And thereupon the governor grants the land, not only the two arpents in depth actually visited by Andry, but the whole land demanded to the lake, many miles back.

This is literally what was done in Maurice Conway's case, except that the land granted was "all the vacant land in the rear of the front depth," instead of the well-defined terminus of the lake.

What stronger proof could be adduced than this to show that we

have been so many years disturbed and annoyed because the authorities in Washington city were not in possession of such title papers and precedents, which were in great number before the commissioners of 1806, and became their guides?

Those who would make the validity of old grants in Louisiana depend upon a pains-taking and microscopic dissection of the language of the title papers in a dubious translation, do not execute the treaty faithfully and honestly. They must be understood according to the intention and in the spirit of the original parties to them. The relations of the Spanish governors and the inhabitants of Louisiana were patriarchal, good faith and liberality, and a corresponding trustful and loose manner, characterized them, and an instance of technical quibbling never was heard of.

To show the primitive simplicity of the colonial government of Louisiana, and the absence of all strictness and formality in the Spanish mode of granting lands, we may instance the case of "The United States *vs.* Davenport's Heirs," (15 Howard, p. 1,) in which two incomplete grants made by a commandant, one for ninety-two thousand one hundred and sixty acres, and the other for two hundred and seven thousand three hundred and sixty acres, were confirmed by the Supreme Court of the United States.

"The evidence of the grant," says the Supreme Court, (p. 5,) "consists in copies of the petition of Edward Murphy to the commandant, dated in February, 1798, for a donation of the tract of La Nana, situate to the east of the Sabine river, on the road leading from the town of Natchitoches. The tract asked for forms a square of four leagues upon that road, the center of which is the prairie adjoining the bayou La Nana. The motive of the application was that the petitioner might have summer pasturage for his cattle and other animals. The petition was granted by the commandant, and the procurator was ordered to put the grantee in possession. The procurator fulfilled this order the 1st of August, 1798, by going upon the land with the grantee, and in the presence of witnesses 'took him by the right hand, walked with him a number of paces from north to south, and the same from east to west, and he, letting go his hand, (the grantee,) walked about at pleasure on the said territory of La Nana, pulling up weeds, and made holes in the ground, planted posts, cut down bushes, took up clods of earth and threw them on the ground, and did many other things in token of the possession in which he had been placed, in the name of his Majesty, of said land, with the boundaries and extension as prayed for.'" And this was the whole title, and it was confirmed.

In the same case, another claim to a tract of land called "Las Omegas" was prosecuted. The order of the commandant to the procurator, to put the petitioner in possession, was executed with the same ceremonial as in the case of the Nana tract.

These were incomplete titles, executed not by the governor, but by the commandant, and together they covered two hundred and ninety-nine thousand five hundred and twenty acres. Those who dispute the Houmas claim would undoubtedly have rejected them, but the Supreme Court of the United States confirmed them.

We hope, therefore, that the great two arpents argument, which has

so long been the main reliance of our adversaries, and the main cause of the vexation we have suffered, may now be considered as fairly and permanently disposed of.

We are thus brought to the real original question, viz: What extent of land passed under the grant, irrespective of Andry's proceedings, which were sufficient to put us in possession of whatever was included in the grant, but explained only the width in front and the direction of the side lines, and not the superficial extent. That must be collected from the grant itself. It is, "*all the vacant land lying and adjoining his front tract of ninety-six arpents on the river, by forty in depth, between the prolongation of the side lines of the front tract.*"

All the title papers agree in this. (See Senate Doc. of 1838, pp. 17 to 20.) Conway first petitions for "*all the depth which may be vacant immediately after the said depth of forty arpents.*" Governor Unzaga, on this petition, directs Andry, the surveyor, to go on the land and put the petitioner in possession of the land "*which then may be vacant on the back of the forty arpents of depth which he possesses, and running in the same direction.*"

Andry certifies that, in pursuance of the above decree, he had gone on the land in the presence of the commandant and the vendor; that "*he proceeded to put the petitioner in possession of the depth granted to him by the foregoing decree;*" that, having ascertained the direction of the side lines of the front tract and measured them on the ground, he ran them two arpents further back, "*para no variar el rumbo,*" in order not to vary the course, which plainly means that he ran these two short lines to indicate the course the further prolongation of those lines should have.

This report having been laid before Governor Galvez, he issued the grant; and, referring to Andry's proceedings, he called these "*proceedings concerning the possession which he had given to Maurice Conway, by virtue of the foregoing decree issued by my predecessor, of all the vacant land behind or in the rear of the first forty arpents;*" and, finding these proceedings conformable to the regulations, he granted to Conway "*the said land behind or in the rear of the forty arpents,*" "*following the same direction as those.*"

That these three men, Unzaga, Andry, and Galvez, who were men of intelligence, and one of whom had sufficient worth and capacity to beat the British and to become viceroy of Mexico, should not have known and understood what they did, is not fairly to be presumed. They used an indefinite term, "all the land in the rear," but they knew that it was well explained by a local usage. If these words were included in a cession *to* the United States, they would infallibly be explained according to their literal meaning, which is, "all the land the Spanish governor had a right to grant between the prolongation of those side lines," and that was up to the Amite river, at that time the boundary of the British province of West Florida. This is a much plainer description than that in the treaty of cession of 1803, under which the United States claimed the country bounded on the east by the Perdido, on the west by the Mississippi, north by the thirty-first degree of latitude, and south by the island of Orleans,

which for many years before had always been administered as a portion of West Florida.

But these indefinite terms, "all the depth," "the depth that may be found," "the depth according to the titles," and others of similar import, are very frequently found in sales passed in the Spanish times in Louisiana, and occasionally even in grants. Their well-understood meaning was that the land was to run back between the side lines, until they struck a considerable water-course, and if the side-lines met before touching such a water-course, they stopped at that point. There existed, besides, a local usage peculiar to Lower Louisiana. There exists a chain of lakes to the east of the Mississippi—Lakes Maurepas, Pontchartrain and Borgne—all connected together, and the latter with the Gulf of Mexico, and it was customary with the governors to make grants run back from the river to these lakes.

According to this usage this grant was understood by all of the parties to it. But the topography of this then almost impenetrable country was but little understood, and it is more than probable that they did not know but very indistinctly at what distance from the river the side lines when prolonged would reach Lake Maurepas, or the principal river falling into it, the Amite. These points, and consequently also the superficial quantity, the governor left to be ascertained by the grantee when he should feel it his interest to do so. In not one of the numerous river grants running to these lakes—and we shall presently speak of a number of them—were the side lines ever protracted to the lake, and its contents ascertained with accuracy. So this grant never was actually surveyed until September, 1805. (Senate Document of 1845, pp. 6, 7.) This survey was laid before the board of commissioners; then, for the first time, the precise length of side lines, the points where they reached Lake Maurepas and the river, and the superficial extent of the grant, were ascertained. Upon this survey the confirmation was made.

We shall presently show that it is with this extent that the claim was possessed in Spanish times; but we would previously show that our adversaries are as usually mistaken when they say that this survey was unauthorized, because it was made after the change of government.

"The fourth section of the act of March 2, 1805, (1 Land Laws, 123,) required the claimant, even under a complete grant, to file his grant and a plat. These private surveys constitute a part of the evidence of the claim upon which the decision of the commissioners was founded. (Bissell *vs.* Powers, 8 How., 334.) Congress have thus virtually recognized these private surveys as competent and proper evidence of the particular tract of land claimed under the grant or concession, carrying out thereby the construction previously given to the act of 1806, and the instructions of the Secretary. (Ibid, p. 336.) The private survey to Mackay, of February 27, 1806, which was filed with the claim, under the act of March 2, 1805, designated and located the grant, so as to give effect and operation to the act of 1811, reserving the premises from sale. (Ibid., p. 341.)"

From this case and the cases of Menard's heirs *vs.* Massey, 8 How., 309; Stoddard's heirs *vs.* Chambers, 2 How., 284; Mills *vs.* Stoddard,

8 How., 364; Barry *vs.* Gamble, 8 How., 53, it appears that the land designated by a private survey filed with the board of commissioners was withdrawn from sale under the sixth and tenth sections of the act of Congress of March 3, 1811, and that the subsequent confirmation of the claim applied to the land so designated.

It will be freely admitted that the grant of Galvez to Maurice Conway is quite contrary to modern practice, and to what does and must prevail in older countries, where land has more value, and that it is quite indefinite in its terms as to the quantity of land granted.

But its locality can be, and has been, ascertained with absolute precision, by protracting the side lines to the water-courses in the rear, and "a description which will identify the land is all that is necessary for the validity of a grant." (McArthur *vs.* Browder, 4 Wh., 485.) "If a grant be made which describes the land granted by courses and distances only, these, though not safe, are the only guides given to us, and must be followed."—(Chinoweth *et al. vs.* Lessee of Haskell, 3 Pet., 96.)

Our opponents, in their attacks upon the grant, question the best established principles. They dispute the power of the governor, although it is well known that his power was unrestricted, (9 Pet., 132, 134, and 135; 6 Pet., 691; 7 Pet., 51; 8 Pet., 436; 15 Pet., 128,) and that no grant of the governor was ever revoked by the king, and no grant ever rejected by the Supreme Court of the United States, on the ground of want of power on the part of the governor. They find objections to the grant in its magitude, although the Supreme Court has decided that this can exercise no effect whatever upon the validity of a grant.

They assert dogmatically that the grant ought to have been restricted according to O'Reilly's regulation, although in Delassus *vs.* The United States, 9 Pet., 135, Chief Justice Marshall said: "The objection made to this plain title is, that the concession is not made in pursuance of the regulations of O'Reilly. This objection was considered in the cases heretofore decided by this court, and especially in 8 Peters, 455. It is apparent that these regulations were intended for the general government of subordinate officers, not to control and limit the power of the person from whose will they emanated. The Baron de Carondelet, we must suppose, possessed all the powers which had been vested in O'Reilly."

In the case of Arredondo, 6 Peters, 760, the Supreme Court confirmed a grant of 289,645 acres, in the case of Mitchel, (9 Peters, 725,) one of 1,200,000 acres, and in the case of Davenport's heirs, one of 92,160, and the other of 207,360 acres; and although they were made by simple orders of a commandant, and not ratified by the governor. Our claim contains considerably less than 200,000 acres.

It is evident that our adversaries must have taken it for granted that their assertions would be implicitly believed, and pass without contradiction.

It is clear that the governor had the power to make the grant, that he actually made it, and that whatever is included in it became the property of the grantee.

In support of the correctness of the explanation we have given of

the meaning of the words used in the grant, we submit the testimony of the three oldest and most experienced surveyors in Louisiana, Augustus S. Phelps, Allou d'Hémécourt, and Louis Bringier. It contains, besides, explanations of the usual mode of surveying, of which we have already sufficiently spoken. But their testimony may be considered to be more entitled to weight if given entire.

The testimony of A. S. Phelps is contained on pages 33, 34, and 35 of document O, which is the record in the suit of The United States, plaintiff in error, *vs.* James McMasters and Richard A. Stewart, which was tried in the circuit court of the United States, at New Orleans, and is now pending, on appeal, in the Supreme Court.

Answers of Augustus S. Phelps to the interrogatories propounded by defendants.

Answer to the first interrogatory. I was first commissioned as United States deputy surveyor for the State of Louisiana in the year 1828 or 1829, and have been recommissioned in the same capacity under the several surveyors general from that time to the present.

Answer to second interrogatory. I have resurveyed more than a thousand tracts of land, the titles to which were derived from French or Spanish grants, and mostly located upon either side of the Mississippi river, in the section of country lying between the mouth of Red river and the lowest grants on the Mississippi river.

Answers to third to ninth interrogatories, inclusive. In the portion of Louisiana mentioned in the section of country above-mentioned certain general rules appear to have been observed by the government officers and surveyors, during the whole period of the colonial existence, as regards the concession and survey of lands, whether under French or Spanish authority. In the earlier period, grants were usually or almost universally given to settlers fronting on rivers or other water-courses, calling for a specified distance of front on the bank of the water-course, with side lines running back from the front and nearly at right-angles with the water front at the point of departure, to a distance of forty arpents, equal in our measure to $116\frac{36}{100}$ English chains. A right line connecting these two points completed the boundary of the tract, without specifying or having reference to the superficial quantity, which was seldom or never mentioned in either the grant, plat, or *procés verbal* of survey. As the settlements in the colony extended and increased, double concession grants, as they were called, were given, bounded by a grant or grants in front, with an extension of the side lines of the tract in front of them to an additional distance of forty arpents, usually, but frequently, specially in the vicinity of New Orleans, to the lake or some water-course in the rear, and sometimes to an indefinite distance.

I have examined and inspected many hundreds of all the papers connected with the French and Spanish grants, being original documents. In the decree or concession which was issued by the representative of the king, and which conveyed the fee to the land, I do not remember a single instance in which it described the course or direction of any of the boundary lines. The usual form in which the

boundaries and extent of the tract was expressed in the concession was the specific length of the front on a particular water-course, bounded above (on one side) by the lands of A B, (the adjoining proprietor,) and below (on the other side) by the lands of C D, or public domain, as the case may be, and extending to the ordinary depth, (*profundidad ordinaria,*) which was always understood to mean forty arpents of Paris, or, as frequently the case in the vicinity of New Orleans, to a water-course; and sometimes, but very unfrequently, to some other specified or to an indefinite distance. Some instances I have known in which it was stated in the grant of a double concession that the length of the front of the double concession was a certain length, corresponding with the front of the tract immediately in front of it, though, in fact, it was surveyed, occupied, and always held and regarded as having a much greater or less length of front, as the case might be, depending on the converging or diverging of the side lines of the front tract.

In the plat and *procès verbal* of survey emanating from the King's surveyor, who was always a commissioned officer of high standing, the general custom was to note very definitely the following facts: the shape and length of the front line or lines, the course or direction (usually a right line with a magnetic bearing) of the side lines, their lengths, and the names of the grantee and of the adjacent proprietors. The courses and lengths of the back or rear lines were seldom or never mentioned in the *procès verbal*, and were not often shown upon the face of the plat. The main object with French and Spanish surveyors was to furnish the means of perpetuating and identifying, with great certainty, the boundaries of the front portion of the tract of land surveyed, together with the means of ascertaining, at any future time, the direction of the side lines, giving little attention to the boundaries of the balance of the tract, which in fact was, at the time, frequently nearly, if not quite, inaccessible. In order to define and exhibit clearly and minutely their operations, as made on the front of the tract, it was necessary to protract the plat or diagram on so large a scale that the ordinary size of paper used by them generally (foolscap) could only contain the figure of the front portion of the tract, and extending back a few arpents, which was indeed as far, generally, as the marks of the survey on the ground extended.

So far as I have been able to learn from tradition and observation, the French and Spanish surveyors, who delivered the land to the grantee, always endeavored to run and establish the side lines of the grants in this portion of the colony, so that said side lines should be, as near as they could judge, at right angles with the general course of the water-front within view. This view, in most cases, must have been of limited extent, by reason that the banks of the water-courses must have been densely covered with forest trees and undergrowth. Hence it happens that, in a great majority of cases, the side lines of the grants are either diverging or converging, and not parallel. Another result that would be derived from the practice of their system, and which is found to be the fact, is, that within this portion of the colony there is not to be found any vacant lands of triangular form, or otherwise lying between adjacent tracts, as granted and surveyed,

only when lands once granted have been entirely abandoned by the grantee or his successors, except in one case, which is in West Baton Rouge, and in this case there is ground to believe it resulted from an unintentional error.

In resurveying French and Spanish grants in Louisiana, whether under contracts with the general government or for individual claimants, the United States deputy surveyors have been instructed by their superiors, in all cases, to conform to the original mode as far as it could be known and was possible. For my part, I have always conformed to and obeyed those instructions to the best of my ability, and all other surveyors, so far as I know and believe, have pursued the same practice. I have never heard the propriety of this practice questioned, unless it may be in the case now in controversy.

The remainder of his testimony relates to a particular grant, has no bearing upon the subject under review, and is therefore omitted.

The depositions of Allou d'Hémécourt and Louis Bringier are to be found on pages 68, 69, and 70 of document P, which is a certified copy of all the testimony introduced in the case of The United States *vs.* Clarke, the very suit which was tried by Mr. Justice Campbell, of the Supreme Court of the United States, under the joint resolution of June 26, 1846, for the purpose of testing the authority under which Secretary Bibb had issued patents upon the Houmas claim.

Depositions of d' Hémécourt and L. Bringier, for the defendants.

Filed August 2, 1855.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

In the United States circuit court, fifth circuit and eastern district of Louisiana.

UNITED STATES
vs.
DANIEL CLARK *et al.*

Jean Charles Allou d'Hémécourt, a witness for the defendants, having been duly sworn, deposes:

I am sixty-six years of age; I am a professional surveyor; have been engaged in the profession for the last forty years, the last twenty-seven of which in Louisiana; I have been well acquainted with the surveys of the old Spanish surveyors, particularly those of Messrs. Laveau Trudeau, Andry, and Lafon. It was the custom of these old surveyors, in surveying a piece of land, not to trace out every line of the tract and run out the side lines to their extreme limits, but simply to establish the front line and run the side lines back two or three arpents, so as simply to establish their proper course and direction. This was done also in surveying tracts bordering on the river bank.

The expression in regard to the depth of tract in sales, *avec toute la profondeau que s'y trouve ou trouvera, ou qu'il peut y avoir*, all the depth which may be found there is a common and usual one in sales

of that period. This expression I have even seen in concessions; the usual form, however, in these was "as far back as the lake," or "as far back as the *prairies inondées*," inundated prairies.

When these expressions were used, they were intended to sell or concede all the depth that could be found in rear of the front line, without guarantee of the special number of arpents. It is to my knowledge that all the plantations along the river above Carrollton were granted in this way, with all the depth to the lake. The lake is more than two leagues distant from the river.

Mr. Louis Bringier is the only surviving surveyor of olden days that I now know of.

No cross-examination.

ALLOU D'HÉMÉCOURT.

Excepted to by United States Attorney.

LOUIS BRINGIER also a witness for the defendants, having been duly sworn, deposes:

I am seventy-one years of age; I have been a surveyor for thirty-five years past, and was made surveyor general of Louisiana in 1825; I was first made a surveyor of the parish of St. James, by Governor Villeré in 1822, or thereabouts; I first began making maps as far back as 1808.

I have in my possession certain archives of the State, comprising Mr. Laveau Trudeau's old surveys. Spanish surveys I have had frequent opportunities of examining, but not so many of the old French surveys.

I was acquainted with Mr. Lafon, surveyor; he was a man rather extravagant in his notions, *un peu braque;* he was the deputy of the surveyor general south of Tennessee; I do not know that he was ever surveyor general of this State. The first surveyor general of this State was Laveau Trudeau; he was succeeded by Bouchon, to whom succeeded Duplantier.

Having heard the testimony of Mr. D'Hémécourt, I agree with him, and corroborate his view as to the manner in which surveys were made of side lines, and also as to the force of the expression, "all the depth which may be found." The side lines were surveyed their entire length only, at the request of parties who had to pay for the extra labor thus imposed on the surveyor, and to clear the road to enable him to proceed.

No cross-examination.

L. BRINGIER.

The foregoing testimony was taken at the request, and by the consent, and in the presence of J. P. Benjamin, Esq., for the defendants, and Thomas S. McCay, United States attorney, and by me reduced to writing in the presence of the witnesses, and by them subscribed and sworn to.

In testimony whereof, I hereto set my hand at New Orleans, this 2d August, 1855.

ROBERT M. LUSHER,
United States Commissioner, Eastern District of Louisiana.

All this evidence was taken contradictorily with the district attorney of the United States.

In further illustration of this mode of construing and surveying grants, we shall refer to some of the documents already submitted. Let it be, however, understood that this was a local usage, prevailing only in the lower part of Louisiana, where there is infinitely more swamp than dry land, notwithstanding the extensive embankments now constructed, where the nature of the ground, and the water, and the tangled growth which cover it, render surveying very laborious and costly, and where the rear lands were generally of very little value. By far the greater part of the Houmas grant is such swamp.

Document K are title-papers in the claim of B. Lafon. (Claim 316 of the report of the old board, 2 Public Lands, 278.) There is a complete grant by the governor and *commissaire ordonnateur*, of March 10, 1763, to Maxent, the granting words of which are:

"We grant to him the land he petitions for, at the place called Chantilly, to wit: beginning at the boundary of the thirty arpents, situated in said place which we granted on the 9th instant to Dufossat, as far as the point called Chefmenteur."

Upon this grant, and upon the further order of the intendant, Morales, Carlos Trudeau, then the surveyor general of the province, made, on the 28th of April, 1800, a "*plano figurativo*," (that is, not an actual survey, but a map compiled from materials in his office,) representing, as the report says, the remainder of the land, from the boundary of the village or settlement of Chantilly to the river Chefmenteur, petitioned for by the applicant. And by referring to the *plano figurativo*, of which a certified copy is in the document, it will be found that, under this description, Trudeau set apart for the petitioner the whole remainder of the peninsula, as far as Lake Pontchartrain, the Chefmenteur river, and Lake Borgne, bounding it by the adjoining concessions.

There never was in Louisiana a surveyor general longer in office, more experienced, more competent, and more universally respected than Carlos Trudeau.

Document L are title-papers of the claim of Charles J. B. Fleuriau, reported on by the old board, No. 213, (Public Lands, vol. 2, p. 272,) and confirmed by special act of Congress, of July 27, 1854.

The first is a petition of Joseph Villars Dubreuil, of the 1st of June, 1763, to the governor and *commissaire ordonnateur*, showing that already, in 1744, he had conceived the project to establish several stock farms; that, with a view of finding lands adapted to this purpose, he had examined the lakes of the "Onachas;" that he had only discovered a tongue of land near La Fourche des Chetimachas, (now called Bayou Lafourche,) in the rear of Lake Perrier, fit for his purpose, and belonging to the Indian tribes of the Onachas and Conachas; that he had made a bargain with these Indians, by which, for a certain number of heads of cattle, they had abandoned to him the above-mentioned land, and also another tongue of land, separated from the former by the Bayou Chaique-machas, (*sic.*) The first tract may have 25 arpents front of high land, bounded on one side by Bayou Chaique-machas, and on the other by Lake Perrier, and bounded (on the other two sides)

by trembling prairies. He therefore prays that his aforesaid purchase from the Indians be approved.

On this petition the governor and *ordonnateur* made to him a grant, on the 1st of June, 1763. The only description of the land in the grant is: "the land mentioned in the petition."

Under the confirmation of this grant by special act of Congress: more than 40,000 acres have been surveyed by the United States for the claimants. It is true that the greater part of this land is worthless; and such is the case with all the *large* grants in the lower part of Louisiana, near the Mississippi.

Document M relates to the claim of the widow of Jacques Fortier. (No. 68 of Harper's report of January 6, 1821, confirmed by act of Congress of February 28, 1823—a general act.) The notice represents that she is the owner of a tract of $27\frac{1}{2}$ arpents front of the Mississippi, "*with all the depth to be found.*" This claim was confirmed in the very words in which it was made.

Thus we find this expression in a report confirmed by Congress. And how was it interpreted by the United States surveyor? This is shown by the approved survey. The side lines were protracted until they met, the front tract having converging side lines. It is evident that, if the side lines of the front tract had been parallel or diverging, they would have been protracted until they reached Lake Pontchartrain, this tract being in that part of Lower Louisiana, on the eastern bank of the Mississippi, where grants very frequently extended to the lake, and to which the custom we contend for applies.

But document N is a case absolutely in point, and, as we presume, unanswerable. This is the claim of Charles Devilliers, confirmed by the old board of commissioners as claim No. 135, (2 Pub. Lands, 26.) Perry, the original claimant, presents a petition on the 3d of November, 1764, to d'Abadie, director general and commandant of the province, in which he represents that he is the owner of a tract of 15 arpents front on the Mississippi, by 40 in depth; that he has a large family, and limited means, and therefore prays for a grant of "*toute la profondeur, et largeur de sa terre excedant ses quarante arpents contenant quinze arpents de face;*" that he had received no concession, but had purchased his front tract. The underscored passage is absolutely the only description of the land asked for contained in the petition, and means "all the depth and width of his land beyond his forty arpents, having fifteen arpents front."

Here, then, we have the identical description of the land asked for, which is found in Maurice Conway's petition and grant, "all the depth" behind the front depth of forty arpents of the front tract.

On the 6th of November, 1764, the director general (or governor) made a grant upon this petition. Had he followed the precise words of the petition, and simply granted "all the depth," we should here have the exact counterpart of the Houmas claim. But the governor explains in the grant what he understands by "all the depth," and it can hardly be questioned that his act is the best proof of a local usage, as he contributed to create it. The grant says, that "considering the demand which Mr. Perry has addressed to us, to grant to him the depth which may be found beyond the ordinary depth of forty arpents

of his plantation, which has fifteen arpents front on the river St. Louis or Mississippi, below and on the same side as the city of New Orleans, * * * * in virtue of the powers, * * we have granted, and hereby grant to him, the said depth beyond his ordinary depth of forty arpents, *as far as the lake.*"

The words here above quoted are the only ones describing the land referred to, either in the petition or in the grant. The governor sets out by stating that he intends to grant the land asked for by the petitioner—that was, "all the depth;" and with that intention the governor says that this depth goes to *the lake.*

So, in our own case, the governor would have mentioned the water-course to which "all the depth" extended, if a correct map of the country had been in existence at that time. Being uncertain whether the prolongation of the said lines would touch the lake or the river, they left this matter to be inquired into by the grantee, if he should choose to take the trouble and incur the expense, being persuaded that the well known local term of "all the depth" would take him to one or the other.

Lafon's survey shows that the lower line goes to the lake, and the upper to the river.

But we have contemporaneous explanations, showing that the depth was considered to extend thus far. This grant was claimed and possessed under the Spanish government with a great depth, though what this was, was not precisely ascertained until an actual survey was made. This evidence is contained in Senate Document of 1838, pp. 21 to 29.

On the 5th of March, 1778, less than a year after the grant, and within nineteen months of the operations of Andry, Maurice Conway sold a portion of this land to Oliver Pollock by notarial act. He sold 36 arpents of the front of it, with the depth, "*to the lake.*" (In the Spanish sale, on page 21 of the foregoing document, there is a misprint in the 4th line, to wit: el fondo hasta el *lado*, instead of el fondo hasta el *lago*. Lado means *side*, and lago *lake*. The misprint is apparent from the remainder of the sale.) He states, when he purchased the land jointly with Latil, that he bought the other half of it from Alexander Latil on the 4th of January, 1776; that, in the first of these sales, it was stated that the land had only half a league in depth; that he had applied to the governors of the province, Unzaga and Galvez; that the former authorized Don Louis Andry to go to the district of Lafourche, which is the place where said land is situated, and to give to him (Conway) possession of what more land he wanted, besides what he had purchased; that Andry having done so, on the 9th of October, 1776, he measured the said land in his (Conway's) presence, from the boundary of François Duchan to that of Michel Chiasson, and he found that it contained 96 arpents in front, and a *depth to the lake*, and as I (Conway) had purchased only forty arpents, he, (Andry,) by virtue of the above-mentioned order of Don Louis de Unzaga, put me in possession of the whole remainder, as *far as the lake;* all which was approved by Don Bernardo de Galvez on the 21st of July, 1777. And as I have the right and power to sell, I hereby sell to the said Oliver Pollock the said 36 arpents in front in this wise, viz: 21 arpents in front, with the *above-mentioned depth*, bounded on both sides by me,

the vendor, for the sum of $2,000, and 15 arpents front, *with the same depth*, also bounded on one side by me, the vendor, and on the other by Gabriel Peró, for $1,500, which make together $3,500; and I declare that this is the just price and full value of the aforesaid 36 arpents, *with the above-mentioned depth;* and the said Pollock declares that he accepts the sale of the aforesaid 36 arpents, "*with the above-mentioned depth.*"

The preceding extract is a translation of all that is in the slightest degree material in that sale.

It is obvious that what Maurice Conway then says of Andry's operations, is less a statement than an explanation of the meaning and purposes of Andry's proceedings. Andry does not in his *procés verbal* speak of the lake, nor does he describe the depth of which he had given possession, in any other manner except as the depth "granted to him (Conway) by the foregoing decree" of Unzaga. Andry had his doubts where the prolongation of the side lines would touch a considerable water-course; he was not well acquainted with this section of country, nor could he have traced these lines in a day or a week, or without receiving more pay than the whole rear land was worth. But there is no doutb that both he and Maurice Conway understood that it would go to the first considerable water-course or lake, such being the depth of the larger grants between the river and those lakes. Maurice Conway assumed that it would reach the lake, and he was right as to one, and wrong as to the other line. A large anterior claim in this immediate vicinity goes from the Mississippi to Lake Maurepas, and the Amite. This is the claim confirmed in the name of John McDonogh. (See Public Lands, vol. 3, p. 254.)

The declarations contained in this sale are perfectly unsuspicious. It was made in a notarial act passed in New Orleans, which was, according to the practice of the civil law, open to the inspection of every one; and when it is recollected what a small community New Orleans, and even all Lower Louisiana then was, how few transactions then took place, how everybody's business was known to everybody, it would be absurd to suppose that Conway would have ventured to state a deliberate falsehood over his signature in the presence of Andry and Galvez. He could have had no possible object in doing so, for if it had been necessary he would have gone to the expense of a measurement of the side lines; he could have obtained from the governor an explanation, inserting into his grant whatever he might have found to be the true distance of the side lines. And he would have appeared contemptible if he had designedly misrepresented in an authenticated and public act what everybody knew to be the local custom and understanding.

So, also, after the death of Maurice Conway, when William Conway, his heir and executor, found it necessary to execute a mortgage in favor of James Mather, who had become security for one of Maurice Conway's debts, he gave that mortgage on a part of the Houmas grant, which still belonged to Maurice Conway at the time of his death, and had been adjudicated to William Conway. In the notarial act of mortgage, which was passed on the 5th of February, 1795, (p. 23 of Senate Document of 1838,) he describes this land as having *thirty arpents front by a depth to the lake.*

It does not appear that under the Spanish government any objection was ever made to this depth claimed for the Houmas grant. On the contrary, the fact that a very great though not accurately defined depth was claimed for this grant was brought home, directly and distinctly, to the very head of the land department of the government, who had the exclusive right to grant land, and to regulate all matters appertaining to the land system—to Morales, the intendant. And he received this claim not with animadversion, but with assent. (See Senate Journal of 1838, p. 24.) We there find the extract from the last will and testament of G. A. de St. Maxent, in the 18th article of which it is declared that he was the owner of a plantation called the "Houmas," at about eighteen leagues from the city of New Orleans, which he had purchased for the price of $6,000 from Maurice Conway, about seven years ago, measuring eighteen arpents in front by *upwards of four leagues in depth.*

"Upwards of four leagues in depth" is still indefinite, but clearly shows that Maxent considered himself entitled to a great depth. He may, during a dry season, in hunting excursions, have gone to a distance into the woods, which he approximately estimated as being in a direct line, at least four leagues from his front, and not having at that distance encountered such a water-course as, according to the usage, was the boundary of such a claim, he concluded that his land must have a greater depth than that distance. He was not very far from the truth as regards the central, the Clarke portion of the claim; for the sides lines of this are now ascertained to be, one thirteen, and the other fourteen miles in length, and four leagues are nearly thirteen miles. The thing, however, which this declaration conclusively proves is not that the land had that precise or any precise depth, but that Maxent wrote under the impression produced by the well known usage.

That this declaration, made in a will, in the solemn hour when he was settling his account with this world, without the possibility of being influenced by interest, is entitled to the weight of contemporaneous evidence of the common understanding of a well known usage, is self-evident.

After the death of Maxent, his will, and all the judicial proceedings relative to his estate, passed under the eye of J. V. Morales, the intendant of the province, acting at the same time in a judicial capacity, and of the licentiate, (a title nearly equivalent to doctor of laws,) Manuel Serrano, the assessor of the intendency, that is, the legal adviser, the solicitor of the treasury of the government. These high law-officers signed all the orders issued in the settlement of the estate, sometimes with their names in full, and sometimes with their flourishes or paraphs. In Spanish countries each official adds to his signature a flourish, which is as well known as his signature, and supposed to be more difficult of imitation. Often they sign with their flourish alone, and then it is called a "half-signature." In Spanish bills of costs the charge for a half-signature is something less than for a full signature.

These two officers then ordered the appraisement of the land of the Houmas, and its sale for cash, provided it brought more than two thirds of its appraised value. (Page 24 of Senate Document of 1836.) By the law of Spain, a judicial sale was first made for cash; but if the

property did not bring two thirds of the appraised value, it was offered again on credit. Such is still the law of Louisiana.

This order was addressed to Evan Jones, the commandant of the post of Lafourche, and as such the local judicial officer. He recommends, on the 1st of August, two persons to act as appraisers; on the 3d of the same month, Morales and Serrano appoint them, and then these persons make and return their appraisement. They say that they are well acquainted with the Houmas lands belonging to the estate of the late Colonel Gilbert Anthony de St. Maxent; that the tract measures about twenty-nine arpents in front by *upwards of four leagues in depth;* that the same is now uninhabited, without any buildings or improvements whatever, and they appraise it at $2,400.

Thereupon, Morales and Serrano order that this appraisement be shown to the printer, and that the printer advertise the property to be sold on the 13th of the same month, at the intendant's house.—(Page 25.)

The printer accordingly advertised it in the Gazette. On page 29 will be found the French original, and on page 26 a translation of this advertisement, in which the property is advertised as "*a* (tract of) *land twenty-nine arpents in front by about four leagues in depth;* at the place commonly called Houmas, belonging to the estate of the late St. Maxent, appraised in the inventory at $2,400.

But immediately after having given the first order of sale, which directed the property to be sold at the intendant's house in New Orleans, Morales and Serrano, amended this order, and gave a new one, (p. 26,) which sets forth that, whereas the previous decree was to be executed only if Evan Jones, the commandant of Lafourche, should have been unable to sell said *lands*, an order was directed to him to proceed to said sale for cash, but not for less than two thirds of its appraised value, *to pay the sum due for the making of the levee*, and that the balance of the proceeds should be forwarded "*to this tribunal.*"

In compliance with this order, Evan Jones, the commandant, sold this tract of land at auction on the 12th of August, and it was adjudicated to Louis Faure, the highest bidder, for $1,650, this being $50 more than two thirds of the appraised value.—(Page 26.)

In the report of this adjudication, the land is described as follows: "The said land situate at the Houmas, belonging to the estate of the late Colonel Anthony Gilbert de St. Maxent, measuring twenty-nine arpents in front, *by the depth which could be found*, opening about thirty-six degrees."

We have already abundantly shown, *that the depth which could be found,* was an expression applied only to lands which had more than the ordinary depth—which had such a depth as could be ascertained only by an actual survey not yet executed. This was indeed more exact than the designation of "upwards of four leagues in depth." It gave at once to understand that a survey was requisite to know the real depth, and that that depth would depend upon a water-course.

It is important to observe that this was a judicial sale, ordered to pay for the levee which had been made in front of the land. It is well known that lands on the Lower Mississippi can be cultivated only if protected by a levee, and that the levees had to be continuous, for oth-

erwise the water would have gained on the plantations from behind. The Spanish government imposed upon each front proprietor the obligation to construct and maintain the levee in front of his land, and if he neglected it the government had the levee made, and the land was seized and sold to pay for it.

In a judicial sale such property passes as is advertised. Here the advertisement gave to the land "upwards of four leagues in depth." How much more could only be ascertained by extraneous evidence. But four leagues passed at all events, and certainly.

Now this description was contained, as has been shown, in several proceedings which were submitted to Morales, and on which he made orders. The very unusual phrase, "upwards of four leagues in depth," must have attracted his notice. He must be presumed to have read what he signed. The consistent declarations of St. Maxent, who was a colonel of the local militia, of Evan Jones, the commandant, of Morales, the intendant, and Serrano, the assessor of the appraisers, &c., must be looked upon as conclusive evidence of the existence of a local custom, according to which those expressions had a well-defined meaning. Could the purchaser, under such an order and advertisement, afterwards have been disturbed by Morales, as the head of the land department, when he, as chief judge, had ordered that sale? "The power of granting the public domain was in Morales, who resided in New Orleans."—(Les Bois *vs.* Brammell, 4 How. R., 449.)

But this is not all. On another occasion, the attention of Morales was drawn to the depth of the Houmas claim in a very special and emphatic manner; this very depth being the gist of an especial communication.

St. Maxent, at the time of his death, owned two tracks of land in the Houmas claim. In his will (p. 24) he speaks of one only; but the evidence in the Senate Document of 1838 does not inform us how long before his death that will was made. One of these two tracts was the plantation of 18 arpents front by a depth of upwards of four leagues, mentioned in the will. The other was the tract of land to which the above-mentioned proceedings relate. The latter had *twenty-nine* arpents in front by upwards of four leagues in depth, was uninhabited, and without any buildings or improvements at the time of St. Maxent's death, and was appraised at $2,400, and sold to Louis Faure for $1,650. The other was the "plantation" of St. Maxent, mentioned in his will. It had only 18 arpents front on the Mississippi, by upwards of four leagues in depth. It is to this latter property that the petition of P. Marigny refers, which is found on page 27 of the Senate Document of 1838. P. Marigny, who styles himself the syndic of the creditors of Colonel Gilbert de St. Maxent, represented to the intendant that, according to an official letter which had been addressed to him (the intendant) by Michel Cantrell, commandant of the post of Cabahanoce, the *plantation* belonging to the estate of St. Maxent, situated in the post of Lafourche, and commonly called the Houmas, could not be sold, because, although it had been several times offered at auction only $1,500 had been offered for it; that the said plantation had been appraised by three appraisers, at $4,500; that perhaps the reason why a higher price than $1,500 had not been offered for it, was that the peo-

ple were ignorant of the depth belonging to said plantation, which St. Maxent stated, in his will, to be upwards of four leagues; that, therefore, the bids were not in proportion to the value *which that depth must give to the plantation.* Wherefore he prays that an order may be addressed to Michel Cantrelle, containing this representation, and the intendant's decree thereon, that the sale may be postponed until August next; that circulars may be sent to the neighboring posts to receive bids, "*and informing every one of the depth which belongs to said plantation.*" And thereupon the order was given, "Let it be done as prayed for," and signed by the paraphs of Morales and Serrano.

Thus this claim was notoriously made ever since 1778, forced upon the notice of the public officers, and never questioned. Under this claim the grantee and his assigns had a possession of twenty-six years under the Spanish government, which claim would suffice to protect them; for, under the Spanish law, the domain could be acquired by the prescription of ten years. (See the decisions of the supreme court of Louisiana in Sanchez *vs.* Gonzalez, 11 Martin R., 210; Pepper *vs.* Dunlop, 9 Ann. R., 141.) And this is incidentally recognized by the Supreme Court of the United States, in Mitchell *vs.* The United States, 9 Pet., 760. This provision of the Spanish law is the source of the most important enactment contained in the second section of the act of the 3d of March, 1807, by which persons who were, on the 20th of December, 1803, (the day when Louisiana was delivered to the United States,) and had been for ten consecutive years prior to that day, in possession of a tract of land not exceeding two thousand acres, were confirmed in their titles to said land.—(1 Lou. Laws, 153.)

The terms of this act show that "their titles" were their possession—it was unnecessary to show anything else; and a vast number of claims, of which the original titles were lost, or difficult of access, were confirmed under that section.

The restriction to 2,000 acres was owing to the doubts which at that period were entertained concerning the authority of the governors and the usages and customs of the colony—doubts which have since been dispelled by the Supreme Court of the United States.

The difference between the easy and loose manner in which the Spanish government acted in regard to its domain, and the mathematical precision of the American government in the management of its public lands, is indeed so radical, that minds thoroughly familiar with the latter are with difficulty brought to realize the totally dissimilar aspect in which transactions must be viewed under the two systems. The rule, and the only safe, just, and rational rule, is to investigate how the Spanish government would have considered a claim. What that government would have done, the United States are now bound to do in relation to these old claims. That obligation is greatly increased in proportion to the length of time that has elapsed before the United States finally acted, and the unavoidable disappearance of much of the evidence. Measured by that test, we can safely say that in the history of all the Spanish grants in Louisiana, which are contained in the records of the different boards of commissioners, and form no uninteresting or unimportant part of the ante-Ame rican history of Louisiana, not a single incident is to be found fromwhich the most,

remote inference could be drawn, that such a claim as ours, accompanied by constant residence upon the grant, would ever have been questioned.

Respectfully submitted.

LOUIS JANIN.

APPENDIX.

GENERAL LAND OFFICE,
February 28, 1860.

SIR: I have to acknowledge the receipt of your letter of 17th instant, in which you desire an answer to the following questions:

1st. "Assuming the case of a *complete* grant, derived from the Spanish government, which never was filed in or acted upon either by a board of commisioners or by a court of the United States, having authority to decide on Spanish land grants, has any such grant, under the above-mentioned circumstances, ever been held by the General Land Office entitled to a public survey and to a patent, and has the land embraced within it been withheld from sale, and treated as private property?"

2d. "Or have not all lands in Louisiana been treated as public property, unless the title thereto was established before a board of commissioners, or a court of the United States?"

Whilst this office desires to avoid answering all speculative inquiries, we have no objection in the present case to reply to your first interrogatory in the negative, and to the second in the affirmative.

Very respectfully, your obedient servant,

JOSEPH S. WILSON,
Commissioner.

LOUIS JANIN, Esq.,
Present.